

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, 05cr060

v.

U.S. Courthouse
Brooklyn, New York

VINCENT BASCIANO,

March 8, 2011

Defendant. 9:30 a.m.

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TRANSCRIPT OF VOIR DIRE
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

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Proceedings recorded by mechanical stenography, transcript
produced by CAT.

1 (Open court.)

2 THE COURT: Good morning.

3 (The defendant is present.)

4 (Case called.)

5 MS. MERKL: Taryn Merkl and Jack Dennehey for the
6 United States.

7 MR. JASPER: Richard Jasper, George Goltzer, and
8 Beth Bochnak for the defendant.

9 THE COURT: The defendant is present.

10 I have a few housekeeping matters. I think my clerk
11 has distributed a decision as to the three jurors whose status
12 was reserved earlier.

13 You all got it?

14 MS. MERKL: Yes, your Honor.

15 MR. JASPER: Yes.

16 THE COURT: It's posted on ECF.

17 With regard to Juror No. 50, you will recall that is
18 the person who is the paralegal or administrative assistant
19 for the Bankruptcy Trustee in Central Islip. I have some
20 further information from one of the bankruptcy judges out
21 there.

22 He indicated that he believes there are about 10 to
23 12 Chapter 7 bankruptcy trustees and that each one of them has
24 an assistant who helps with preparing the matters. Some of
25 the assistants go with the trustee to the actual hearings and

1 prep the hearings and so Juror No. 50 is one of about a dozen
2 people who do this work in Central Islip.

3 So it would appear to the court that the juror's
4 anonymity would be comprised by virtue of the narrow, the
5 small number of individuals doing the work that she does at
6 that location. But I'd like to hear from the attorneys.

7 MS. MERKL: Your Honor, as the government -- I
8 believe it was the government's motion, and we would maintain
9 that it's not appropriate to seat a juror who is that narrowly
10 identifiable.

11 THE COURT: Does the defense have a position on
12 this?

13 MR. JASPER: Reluctantly we agree, your Honor.

14 THE COURT: Thank you very much.

15 Juror No. 50 is struck for cause for potential
16 breach of anonymity. Thank you.

17 68 is here.

18 Let me just mention one other thing. I'm going to
19 have to finish by 5:30 tonight and we'll get as much done as
20 we can by 5:30 and if anyone is left over they will simply
21 have to come back. I want to let you know about that.

22 MS. MERKL: Just for recordkeeping. The government
23 is also under the impression that there is still one more
24 juror outstanding, 64, but she was from yesterday. So she's
25 going to be in a future position?

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1 THE COURT: Sure.

2 MS. MERKL: I want to make sure my recordkeeping is
3 accurate.

4 THE COURT: We will double check. Thank you.
5 68.

6 (Prospective juror present.)

7 THE COURT: Please be seated. Good morning.
8 You are Juror No. 68?

9 THE PROSPECTIVE JUROR: Yes.

10 THE COURT: I remind you that you are still under
11 oath. Let me ask you this question. Since you filled out the
12 questionnaire, have you read, listened to, watched, observed
13 or learned anything about this case?

14 THE PROSPECTIVE JUROR: No.

15 THE COURT: You indicated that you have been doing
16 your current job for five years; is that right?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: And you are a real estate agent?

19 THE PROSPECTIVE JUROR: Yes.

20 THE COURT: Without telling me who you work for, do
21 you work for a large company or do you work for yourself or a
22 small company?

23 THE PROSPECTIVE JUROR: I work for a small company.

24 THE COURT: Are you also trained as an accountant?

25 THE PROSPECTIVE JUROR: I got my bachelor's a year

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1 and a half.

2 THE COURT: I see. And so have you ever worked as
3 an accountant?

4 THE PROSPECTIVE JUROR: No. I only did taxes for
5 like four years, for a small firm, too.

6 THE COURT: You're not doing that anymore?

7 THE PROSPECTIVE JUROR: No.

8 THE COURT: You mentioned in answer to this
9 question: Are you familiar with the religion or practice
10 known as Santaria? You answered yes, and you said -- then you
11 were asked: If yes, what is your understanding of it? You
12 said, People talk a lot about it.

13 THE PROSPECTIVE JUROR: Yes. I mean where I come
14 from, I heard so much about it, but that's all.

15 THE COURT: Have you ever gone to an event, a
16 Santaria event?

17 THE PROSPECTIVE JUROR: No. I just heard about it.
18 People say you have to be careful. That's all.

19 THE COURT: I see. Now, let me go over some of your
20 answers about the death penalty with you, please.

21 You sort of grimaced. Is there a reason for that?

22 THE PROSPECTIVE JUROR: No. I just -- no. There is
23 no reason. I should have said my point of view, that's all.

24 THE COURT: You were asked to describe your views on
25 the death penalty. You say, I believe that if the law of New

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1 York is in favor of it must be for a reason. Life
2 imprisonment allows a person to continue living and I believe
3 humans fear the most death. If you killed without a reason, I
4 believe two and murder, murder no discrimination, you should
5 also be punished with death. I believe the topic is very
6 complex and I just accept it as what it is a punishment.

7 Is that basically your perspective on it.

8 THE PROSPECTIVE JUROR: Yeah.

9 THE COURT: Now, let me just go over with you how
10 the process works in this kind of a case because it's
11 different from other types of cases because in this case the
12 death penalty is one of two potential penalties for the crime
13 of intentional and deliberate murder.

14 In this case, the government has charged the
15 defendant with having committed an intentional and deliberate
16 murder and also conspiracy to murder and also a weapons charge
17 in connection with the other two charges.

18 The first step, the first part of the case after we
19 select a jury, is that the government is going to put on its
20 case in the guilt portion of the case. In other words, we're
21 going to have a trial on whether or not the government can
22 prove beyond a reasonable doubt to the jury unanimously that
23 the defendant committed the crimes it charges.

24 The defendant is presumed innocent until proven
25 guilty. The defendant has no obligation to put on a case, has

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1 no obligation to testify. The burden is always on the
2 government to prove that the defendant committed those crimes
3 beyond a reasonable doubt.

4 Do you understand that?

5 THE PROSPECTIVE JUROR: Yes, I understand that
6 completely.

7 THE COURT: Okay. Now, if, and only if, the jury,
8 after hearing all the evidence and hearing the law as I give
9 it to the jury, and deliberating on guilt or nonguilt, if the
10 jury returns a verdict of guilty for the intentional and
11 deliberate murder of an individual, then, and only then, will
12 the jury be asked to conduct, to participate in a second
13 trial.

14 The second trial is what is called the penalty phase
15 of a death penalty litigation. In the penalty phase, the
16 government has the obligation of putting before the jury
17 whatever aggravating factors it believes would demonstrate to
18 the jury beyond a reasonable doubt that the defendant should
19 not receive the lesser penalty of life in prison without the
20 possibility of release but the greater more severe penalty of
21 the death penalty.

22 They will present information possibly about the
23 defendant's background, other activities of the defendant,
24 possible other criminal acts the defendant is accused of or
25 has been convicted of, his behavior and other information that

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1 they believe would be helpful to the jury in reaching the
2 conclusion to impose the death penalty.

3 The defense has the right to present to the jury
4 what we call mitigating factors, factors about the defendant's
5 background and circumstances and his record that would
6 counterbalance anything the government is submitting to you
7 and would justify the continuation of or the imposition of the
8 lesser penalty, which is the life in prison without the
9 possibility of release penalty. So that will be the second
10 trial.

11 THE PROSPECTIVE JUROR: Yes.

12 THE COURT: And so you would at that point --
13 remember, the defendant's already been found guilty. Now the
14 question is what should the penalty be? So if the jury
15 returns a verdict of guilty of intentional and deliberate
16 murder in the first phase, and after the jury hears the
17 aggravating factors and the mitigating factors in the penalty
18 phase, could you impose a penalty of death on a defendant if
19 circumstances were appropriate?

20 THE PROSPECTIVE JUROR: Yes. If appropriate, yes.

21 THE COURT: And, also, could you impose a penalty of
22 life in prison without the possibility of release against the
23 defendant who had been found guilty of intentional and
24 deliberate murder?

25 THE PROSPECTIVE JUROR: Yes.

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1 THE COURT: Now, this is a general question and let
2 me just -- I'll give you a moment to think about it -- sitting
3 in the penalty phase of the trial, is there other
4 circumstances of the background of a defendant which you think
5 would be important to know about in terms of mitigating
6 factors?

7 THE PROSPECTIVE JUROR: You're asking me if it is
8 important to know the background?

9 THE COURT: Well, yes. I am. I'm asking you what
10 kind of information might be important to you to consider
11 about a defendant's background.

12 THE PROSPECTIVE JUROR: Can you repeat the last part
13 again.

14 THE COURT: What kind of information -- if you're
15 considering the background of the defendant in the penalty
16 phase, what would you like to know about the defendant's
17 personal background or activities that would help you in
18 reaching a decision on the penalty?

19 THE PROSPECTIVE JUROR: That's a hard question.

20 THE COURT: Of course that's a hard question.

21 THE PROSPECTIVE JUROR: Yes, it is.

22 Well, I would want to know what people they having
23 around before. What was their routine, like their job. I
24 don't know, what are their values, what are their family
25 things. Stuff like that.

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1 THE COURT: If I told you that the defendant was
2 already serving a life sentence for having committed an
3 intentional murder, would you still be able to consider life
4 in prison without the possibility of release?

5 THE PROSPECTIVE JUROR: If he already did it?

6 THE COURT: No, no. If -- this is hypothetical --

7 THE PROSPECTIVE JUROR: Yes, I understand.

8 THE COURT: -- if there was evidence at the penalty
9 phase that the defendant was already serving a life sentence
10 without the possibility of release for another murder --

11 THE PROSPECTIVE JUROR: Okay, yes.

12 THE COURT: -- would you still be able to consider
13 the possibility of imposing a life sentence?

14 THE PROSPECTIVE JUROR: No.

15 THE COURT: Why not?

16 THE PROSPECTIVE JUROR: Cause he already did one.
17 Right? Is that what you're telling me? He already was paying
18 life sentences and he already did it again, is that what
19 you're saying?

20 THE COURT: Well, he's serving a life sentence for
21 another murder.

22 THE PROSPECTIVE JUROR: And now he is being charged
23 again for another murder, a second murder?

24 THE COURT: This is a second murder.

25 THE PROSPECTIVE JUROR: Yes.

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1 THE COURT: And the jury has found him guilty of the
2 second murder, and the question is, would you consider, in
3 that situation, a life sentence as opposed to the death
4 penalty?

5 THE PROSPECTIVE JUROR: No.

6 THE COURT: Why not?

7 THE PROSPECTIVE JUROR: Because if he's guilty
8 because he did it again, it's going to be a second time that
9 he's guilty, right?

10 THE COURT: He did it twice.

11 THE PROSPECTIVE JUROR: Yes.

12 THE COURT: Which one happened first is not the
13 issue.

14 THE PROSPECTIVE JUROR: It doesn't matter. It's that
15 he keeps on doing it.

16 THE COURT: What would that mean to you?

17 THE PROSPECTIVE JUROR: That he's not going to stop.

18 THE COURT: Well, is there anything that would cause
19 you to think differently, assuming that were the case, is
20 there anything about a defendant that you might take into
21 account on the other side of the scale, in other words, in
22 favor of a life sentence in that situation?

23 THE PROSPECTIVE JUROR: It could be the
24 circumstances. Maybe the second time was something that, I
25 don't know --

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1 THE COURT: They are both intentional for our
2 discussion, for this hypothetical.

3 THE PROSPECTIVE JUROR: I have to hear like the whole
4 set of things to make me change my mind. I have to hear what
5 was the reason or, you know, what evidence were found. I
6 mean, I have to hear more in order to change my head. I mean,
7 if you say like with nothing else around, I would say, no. He
8 did it twice, I mean, that's a bad thing.

9 THE COURT: It's very difficult --

10 THE PROSPECTIVE JUROR: It is difficult, yeah.

11 THE COURT: -- to discuss this in a relative vacuum,
12 so we appreciate, you know, the problem that you have when
13 asked a question like this. But we still need to ask to get a
14 sense of your views --

15 THE PROSPECTIVE JUROR: Okay.

16 THE COURT: -- obviously. Okay?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: In your questionnaire you gave this
19 answer to this question. The question is: In your opinion,
20 is the death penalty the only appropriate sentence for a
21 defendant who has been proven guilty beyond a reasonable doubt
22 of deliberately and intentionally killing another person if,
23 as here, the alternative sentence is life imprisonment without
24 the possibility of release? You checked off yes. And you
25 answered as follows. Death what is we fear the most and life

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1 in prison will allow that person to continue behaving as they
2 did.

3 Is that always your view with regard to someone who
4 has committed an intentional and deliberate murder?

5 THE PROSPECTIVE JUROR: Yeah. I mean, I don't know,
6 I should believe that it's hard to change certain -- how you
7 say -- I don't know how to say it.

8 THE COURT: Are you talking about you or are you
9 talking about the person who committed the crime at this
10 point?

11 THE PROSPECTIVE JUROR: No, who committed the crime.
12 I believe that there are certain things that you come with
13 inside of you. I don't know, there are certain things that
14 are -- like you were born with them and, I don't know, or the
15 environment makes you like this, whatever, you know. So I
16 think there are certain things that won't change.

17 THE COURT: Let's talk about environment. That is
18 an excellent term to pursue.

19 If you learned in the penalty phase that the
20 defendant had had a very violent upbringing and had been
21 battered and beaten -- I'm not saying that's the case here or
22 it's not the case --

23 THE PROSPECTIVE JUROR: Yeah, I understand.

24 THE COURT: If that were presented to you as a
25 mitigating circumstance, is that something that you would take

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1 into account when deciding what the penalty should be for an
2 intentional murder?

3 THE PROSPECTIVE JUROR: Yes, I would take it into
4 account in the way that sometimes psychologically you are hurt
5 in a way that -- I mean it's very hard to fix it later on in
6 that way. I would feel like that.

7 THE COURT: Would that weigh in favor -- what
8 would -- which penalty would that weigh in favor of if you
9 concluded that?

10 THE PROSPECTIVE JUROR: I just don't know off the
11 top of my head if you're saying the circumstances were those
12 what would I favor?

13 THE COURT: Well, no. Which side of the scale would
14 it be on, would it be on the aggravating side of the scale or
15 the mitigating side of the scale? In terms of deciding the
16 penalty, mitigating is life, aggravating is inclined to death.

17 THE PROSPECTIVE JUROR: I think I would go with
18 death.

19 THE COURT: You're saying if someone was found to
20 have a terrible childhood and was beaten that would be an
21 aggravating factor in favor of imposing death?

22 THE PROSPECTIVE JUROR: I think it is because the
23 person is not -- how do you say, his raising, his upbringing
24 made him like it is and you cannot change that. How would you
25 change the psychological hurt that this person had all -- I'm

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1 saying, if there was something that the person did
2 intentionally and if they did it over and over, or twice, like
3 you have say previously, I mean the person I don't think had
4 measure, or could measure what he has done. I think those
5 thing affect how you're going to behave in the future, what
6 you do, what you don't do.

7 THE COURT: Thank you.

8 MR. JASPER: Your Honor, could you have us at
9 sidebar?

10 THE COURT: Yes.

11 (Sidebar.)

12 THE COURT: Mr. Jasper.

13 MR. JASPER: Judge, on the basis of what I've heard,
14 this young lady can't sit on this case. She has already
15 stated very firmly, and her demeanor backed that up, that if
16 he's already serving a sentence of life for another murder,
17 and the issue of whether or not that was previously or not
18 really doesn't make a difference because, as she said in her
19 own words, it doesn't make a difference to her, this would be
20 the second one.

21 Naturally, where we're going with this, and she even
22 believes that -- it's her view that a damaged childhood is
23 actually an aggravator, that a person could never change and
24 the government has noticed as one of the aggravating factors
25 the inability to be rehabilitated.

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1 This is not a legal term, but she's a very dangerous
2 juror. She's not qualified under Morgan and I just think
3 there's enough right now --

4 THE COURT: I hear you.

5 Yes.

6 MS. MERKL: We think that there are some questions
7 that she indicated could indicate problems, but she seems
8 fixated on whether he was convicted and did it again.

9 That's been the government's concern about, that
10 flagging that as a potential aggravator at this stage would
11 seem to be concerned about future dangerousness and if we're
12 inquiring as to specific aggravators we should inquire as to
13 mitigators, as to whether or not this juror would consider
14 life imprisonment if she learned about the Bureau of Prisons
15 fashioning remedies to prevent the defendant from being a
16 future danger. Her problem is dangerousness.

17 MR. GOLTZER: For this particular juror it doesn't
18 seem to make a difference because she is so adamant about what
19 the penalty should be for an intentional murder, both in the
20 questionnaire and in her responses now.

21 THE COURT: I'll ask her one more question. The
22 problem with asking about specific aggravators and mitigators
23 is it's a slippery slope.

24 We have asked them in the questionnaire about
25 certain aggravators and we added that, and to focus on a

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1 particular one or two creates, I think, a circumstance where
2 you certainly don't get a balanced, thoughtful response
3 because we are fixated on one particular one way or the way.

4 And it could be an all day affair going through
5 aggravators and mitigators. That may not be the issue here
6 with this juror. The reason I asked her was because of her
7 other answers.

8 MR. GOLTZER: Of course.

9 THE COURT: But it is a problem that we need to
10 grapple with and I'll do my best.

11 MR. GOLTZER: The stridency of her responses on the
12 questionnaire cause that.

13 MS. MERKL: In general terms, the government
14 completely agrees with you. It's a slippery slope, as we have
15 seen over the past couple of days, that's been caused by the
16 repeated re-questioning of these jurors into the same
17 aggravators that they were asked about in the questionnaires.
18 It's trending closer and closer to stakeout questions, and
19 it's not effectively revealing actually bias.

20 MR. JASPER: I don't know if you want to address it
21 here at the sidebar --

22 THE COURT: Not really.

23 MR. JASPER: We can talk about it. That is just
24 the way these things go. When they notice all of these
25 aggravators that all focus on his danger, continuing violence,

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1 it has to be brought up and the whole thing about whether it's
2 a stakeout or case specific, as you pointed out in your
3 opinion, is not easy in any of these cases. All of the courts
4 struggle with this issue.

5 THE COURT: Right.

6 MR. JASPER: It's a tough issue.

7 MS. MERKL: It has been brought up in an appropriate
8 way in the questionnaire.

9 THE COURT: It has. And the only question is, how
10 much more does the court need to do to flesh out the views of
11 the juror within reason.

12 MR. JASPER: Exactly. In Rimer v. Brown, the
13 Supreme Court and the Second Circuit have said that's what the
14 point of this is all about. Yes, we have the questionnaires,
15 but it begins the discussion.

16 As you said, the bottom line is we have to figure
17 out with your Honor determining how much more and where we
18 need to tweak and get into it orally when we see the person
19 sitting in front of us. There is no other way to do it.

20 THE COURT: That's what we're doing. We are doing
21 it the best we can. Thank you.

22 (Open court.)

23 THE COURT: Let me just ask you one or two more
24 questions.

25 In the penalty phase of the case, you might receive

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1 evidence that -- the government may say the defendant has a
2 proclivity to be dangerous in the future, but the defense may
3 provide evidence that the prison system can deal with a
4 prisoner who has future dangerousness by limiting that
5 person's access to other human beings, being placed in a
6 secure facility and so that that would severely limit or
7 eliminate, possibly, the future dangerousness of the prisoner.

8 Do you think if it can be shown that the prison
9 system can adequately deal with future dangerousness that that
10 would enter into your consideration as to what the penalty
11 should be?

12 THE PROSPECTIVE JUROR: Yes. They have it for a
13 reason. They have that -- if they could accommodate the
14 person and they have other people there that were like that,
15 yeah. I could.

16 THE COURT: In that situation, do you believe you
17 could consider and vote for a life sentence?

18 THE PROSPECTIVE JUROR: Yes.

19 THE COURT: Now, the jury will be required in the
20 penalty phase to be unanimous in order or death to be imposed,
21 so everyone would have to vote for it. Do you understand
22 that?

23 THE PROSPECTIVE JUROR: Yes.

24 THE COURT: If even one juror decides for a life
25 sentence it's a life sentence. Do you understand that?

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1 THE PROSPECTIVE JUROR: I read that on there, yes.

2 THE COURT: Yes. If you felt strongly that the
3 defendant should receive a life sentence and everybody else
4 was arguing for a death sentence, and after hearing all the
5 arguments you still believed that the defendant should have a
6 life sentence, what would you do in that situation, how would
7 you vote?

8 THE PROSPECTIVE JUROR: If I strongly agree that the
9 person should not have the death penalty then I will keep it.
10 There's a reason why I decided not to vote the death penalty.

11 THE COURT: Do you understand that the sentence of
12 life is the sentence that we presume is going to be imposed
13 unless it can be proven by the government beyond a reasonable
14 doubt that the aggravators justify a sentence of death. Do
15 you understand that.

16 THE PROSPECTIVE JUROR: Yes, I understand that.

17 THE COURT: So the baseline here is life.

18 THE PROSPECTIVE JUROR: Yes.

19 THE COURT: Can you accept that?

20 THE PROSPECTIVE JUROR: Yes, I can accept that.

21 THE COURT: Any other questions?

22 MR. JASPER: Yes, your Honor.

23 (Sidebar.)

24 MR. JASPER: Judge, I know you covered the burden
25 shifting. I'm still troubled by the fact that she seems to be

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1 a burden shifter based upon her previously answered question.
2 She believed that he should die because of the second murder
3 unless something changes her mind.

4 I wonder if we might use some of the phraseology
5 that the law says, that the defendant starts with the
6 principle that he's entitled to live and the government has to
7 prove that he deserves to die -- although you did basically
8 cover the burden shifting problem in your last round of
9 questions, your Honor.

10 THE COURT: I think if I asked her that question she
11 will say she agrees with it, but I'll ask her.

12 MR. JASPER: I think you're probably right. I
13 withdraw that. I'm ready.

14 THE COURT: To make your motion?

15 MR. JASPER: Yes.

16 THE COURT: All right. I think I tried to close the
17 loop on that.

18 MR. JASPER: I think you're right.

19 THE COURT: In a different way. Thank you.

20 (Open court.)

21 THE COURT: Just one more question.

22 I'm going to return to an issue where there may be a
23 possible aggravator and ask you this. If at the time of the
24 sentencing of the defendant you hear evidence that the
25 defendant has already been convicted of a separate intentional

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1 murder, would you be able to consider mitigating evidence and
2 arguments by defense counsel that a sentence of death is not
3 appropriate in this case and therefore could you consider a
4 life sentence in that circumstance?

5 THE PROSPECTIVE JUROR: Yes, I could consider. I
6 could consider.

7 THE COURT: All right. Thank you for coming in.
8 You could consider what? You can consider --

9 THE PROSPECTIVE JUROR: The mitigation -- you say
10 that the defense will provide information for me to reconsider
11 and they saying the death penalty is not what they believe is
12 correct, so I would reconsider.

13 THE COURT: Is it possible in that situation if you
14 received that mitigating evidence that you could vote in that
15 circumstance for a life sentence?

16 THE PROSPECTIVE JUROR: Yes. I believe that
17 everything is possible. You should have to hear everything
18 around it.

19 THE COURT: Thank you.

20 (Prospective juror leaves.)

21 THE COURT: Motions.

22 MR. JASPER: Move to strike this juror 68 for cause.

23 She has indicated in the earlier part of the court's
24 examination that she is a person who is not qualified to sit
25 under Morgan versus Illinois.

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1 I point again, your Honor, to the firmness and the
2 demeanor that she exhibited when she talked about a defendant
3 who was already serving a separate murder, whether it was
4 previously convicted or not, a separate murder for deliberate
5 intentional murder and her voice elevated. She leaned
6 forward, she was obviously agitated in my view by that and
7 said, You mean a second one?

8 Her consistent answer on the questionnaire was that
9 this is a person who deserves to die. She said that in 118.
10 If they have already committed -- quote, if they have already
11 committed murder, death is what they should receive as
12 punishment.

13 That means that she starts off not only believing
14 that death is what they should start off with, but she also
15 shifts the burden, notwithstanding her answers at the end that
16 the defendant clearly has to show some reason to live.

17 This is a person, your Honor, who firmly and clearly
18 indicated -- her answers changed somewhat, but I think that we
19 have to go with what she said initially and, really, Judge,
20 the way she said it.

21 I mean, she said it in such a way that there was
22 just no misunderstanding, no loophole, no way out. The
23 defendant deserves to die because he did it twice and he's
24 going to do it again.

25 She's also somebody who, when you talked about

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1 childhood background as a mitigator, said that's a reason for
2 a person to be put to death. I was a bit stunned by that
3 because when you asked her why, which is the next follow-up
4 question, she said well, basically because that's it, that's
5 what they're going to do, that's part of their background,
6 almost as if it was saying that the person is hard wired for
7 violence.

8 What they are going to be saying, the government is
9 going to be saying is that Mr. Basciano is essentially hard
10 wired for violence. That's going to be their argument. It's
11 clear throughout the notice of intent. From the continued
12 pattern and the hammering away as to violence and what they
13 set out in their prior trials, it couldn't be clearer.

14 THE COURT: Thank you.

15 MS. MERKL: Your Honor, with respect to the
16 defendant's latter point. The government is not going to be
17 arguing that the defendant is, quote, hard wired for violence.

18 The government is going to be arguing that the
19 defendant as an adult made a conscious and deliberate choice
20 to join a criminal society and took the oath where you have to
21 commit violence in order to do so on behalf of your superiors,
22 which is an integral part of this.

23 This is a conscious and deliberate choice made by
24 this defendant. So the question as to whether or not this
25 juror could consider those specific mitigators is really not

Prospective Juror 68

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1 relevant in the context of the court's determination as to
2 this juror's qualifications.

3 Although the juror's questionnaire did indicate at
4 points that she seems to lean towards the death penalty, she
5 also indicated an ability to consider aggravating and
6 mitigating circumstances in her questionnaire.

7 She also indicated in response to question 102 that
8 she would not always vote for the death penalty in a case of
9 intentional and deliberate murder. She also indicated that
10 she would not always vote for life in prison.

11 The juror's answers on further inquiry from the
12 court suggested that she did not have an obstacle to
13 considering life imprisonment. She's not substantially
14 impaired. She will consider the aggravators and mitigators
15 and weigh both and make a determination in accordance with the
16 law.

17 The fact that she finds one particular aggravator
18 problematic does not make her not qualified to serve.
19 Aggravators are specifically for that purpose. The question
20 is whether she could consider mitigating evidence and
21 arguments against the death penalty in the face of aggravating
22 factors and to that she was unequivocal that she could and the
23 government respectfully submits that she is qualified to
24 serve. She is both life qualified and death qualified.

25 THE COURT: What about her statement in response to

Prospective Juror 68

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1 my question about childhood mistreatment, that she view that
2 as an aggravator and not a mitigator?

3 MS. MERKL: This juror indicated a clear willingness
4 to follow the court's instructions and the government
5 respectfully submits that she would follow the court's
6 instructions if she were to decide that was a mitigating
7 circumstance.

8 MR. GOLTZER: Your Honor, your very thoughtful
9 decision on the three various motions for cause that you
10 issued today refers to the statute, which states that the
11 juror shall consider character and background as mitigation.

12 This juror can't do that. This juror has a fixed
13 attitude that it's not mitigation, which renders her
14 substantially impaired in her ability to follow that
15 particular statutory injunction.

16 MS. MERKL: Before we make that conclusion, your
17 Honor, it would be appropriate to ask her whether or not she
18 could follow the court's instruction in that regard. And in
19 response to all of the court's questions as to whether she
20 could follow the court's instructions she was unequivocal that
21 she could.

22 THE COURT: Is she still here? Bring her back in.
23 (Prospective juror present.)

24 THE COURT: Please sit down.

25 We have one or two more questions. You remember

Prospective Juror 68

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1 that earlier I asked you about whether you would consider
2 evidence presented by the defense of the defendant's difficult
3 childhood, childhood abuse and so forth, and you indicated
4 that you thought it was an aggravating factor and not a
5 mitigating factor in your mind; is that right?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: Well, I would instruct you -- if that
8 were one of the pieces of evidence before you, I would
9 instruct you that the law views the evidence of a difficult
10 childhood, childhood abuse, as a mitigating factor and it
11 should not be used to enhance the aggravators because -- for
12 whatever social reasons you want to give, but that's the
13 general state of the law.

14 If I tell you that that's the law, will you follow
15 the court's instruction and only consider such a piece of
16 evidence as a mitigating factor and weigh that as a mitigating
17 factor to the extent that you think it should be weighed in
18 making your balancing test of mitigators and aggravators?

19 THE PROSPECTIVE JUROR: If I could use it -- if I'm
20 instructed, yes.

21 THE COURT: You would use it as a mitigating factor?

22 THE WITNESS: Yes, if that's what the law states,
23 yes.

24 THE COURT: All right. Thank you, have a nice day.

25 (Prospective juror leaves.)

Prospective Juror 90

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1 THE COURT: Mr. Jasper, I heard all your comments.
2 This only related to one of the comments. Is there anything
3 you want to follow up on that comment beyond what you've
4 already said?

5 MR. JASPER: Yes, Judge.

6 THE COURT: Go ahead.

7 MR. JASPER: I don't want to be too harsh, but that
8 answer to your Honor's question, with all due respect, is
9 meaningless at this point. Her true candid responses and
10 feelings was given much earlier before it was highlighted at
11 the end.

12 THE COURT: Thank you. Anything else?

13 MS. MERKL: No, your Honor.

14 THE COURT: Thank you. I will reserve.

15 Next is number 90. Let's bring him in.

16 (Prospective juror present.)

17 THE COURT: Please be seated, sir.

18 You're Juror No. 90?

19 THE PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: Since you filled out the questionnaire
21 have you heard, listened to, read or watched anything about
22 this case?

23 THE PROSPECTIVE JUROR: No.

24 THE COURT: I have a few follow-up questions for you
25 today.

Prospective Juror 90

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1 THE PROSPECTIVE JUROR: Okay.

2 THE COURT: You are retired from the U.S. Postal
3 Service, is that right?

4 THE PROSPECTIVE JUROR: Yes, sir.

5 THE COURT: How long were you with the Postal
6 Service?

7 THE PROSPECTIVE JUROR: Thirty years.

8 THE COURT: Thirty years?

9 THE PROSPECTIVE JUROR: Yes, sir.

10 THE COURT: Are you doing anything in your
11 retirement in terms of employment? Do you have any other
12 jobs?

13 THE PROSPECTIVE JUROR: No, sir.

14 THE COURT: You indicated that you have difficulty
15 reading or understanding English.

16 THE PROSPECTIVE JUROR: On certain times, yes.

17 THE COURT: In what ways do you have difficulty?

18 THE PROSPECTIVE JUROR: Well, most of them are the
19 lawyer talk, and it's often what -- what I say, the daily use
20 of language.

21 THE COURT: You primarily speak Chinese?

22 THE PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: And was this a problem when you were
24 with the Postal Service?

25 THE PROSPECTIVE JUROR: Usually on my job I work in

Prospective Juror 90

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1 maintenance in the post office, the business of computers and
2 machinery and those work, we get training for it so I didn't
3 have any problem with that field.

4 THE COURT: So because it was a technical job you
5 didn't have any difficulty learning it and doing it; is that
6 right?

7 THE PROSPECTIVE JUROR: Yes.

8 MR. JASPER: Your Honor.

9 THE COURT: Yes.

10 Let me just ask you a question about your jury
11 service.

12 You were once a juror in state court; is that right?

13 THE PROSPECTIVE JUROR: Yes.

14 THE COURT: And you heard all the evidence in a case
15 involving a stolen vehicle; is that right?

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: Was it a criminal case?

18 THE PROSPECTIVE JUROR: Well, I thought it was a
19 criminal. It's not civil case. It was a criminal case.

20 THE COURT: Did you deliberate to reach a verdict --
21 don't tell me what the verdict was -- did you deliberate?

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: And you reached a verdict?

24 THE PROSPECTIVE JUROR: Yes.

25 THE COURT: Okay. I think that's all our questions

Prospective Juror 90

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1 for today. Thank you very much for coming in.

2 Mr. Reccoppa will tell you what to do next.

3 (Prospective juror leaves.)

4 THE COURT: Yes, Mr. Dennehy.

5 MR. DENNEHY: Yes?

6 THE COURT: You're standing.

7 MS. MERKL: I think the parties all concur that this
8 juror might have some difficulty following the evidence and
9 the court's instructions on the law.

10 THE COURT: Based on a lack of proficiency in
11 English; is that right?

12 MS. MERKL: Yes.

13 THE COURT: You're in agreement?

14 MR. JASPER: Yes.

15 THE COURT: I strike the juror number 90 for cause
16 on that basis.

17 We're up to 91.

18 (Prospective juror present.)

19 THE COURT: Please be seated, ma'am. Good morning.

20 THE PROSPECTIVE JUROR: Good morning.

21 THE COURT: You're Juror No. 91; is that right?

22 THE PROSPECTIVE JUROR: Yes, I am.

23 THE COURT: You are still under oath. Let me remind
24 you, you are still under oath.

25 THE PROSPECTIVE JUROR: Yes.

Prospective Juror 91

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1 THE COURT: Let me ask you this. Since you filled
2 out the questionnaire, have you heard anything about, read
3 anything about this case?

4 THE PROSPECTIVE JUROR: No, I haven't, sir.

5 THE COURT: Thank you. I'm going to follow up on a
6 few questions.

7 THE PROSPECTIVE JUROR: Okay.

8 THE COURT: You indicate that you have worked for
9 13 years in your current position; is that right?

10 THE PROSPECTIVE JUROR: Yes, sir.

11 THE COURT: And you are a legal secretary; is that
12 right?

13 THE PROSPECTIVE JUROR: Yes, I am.

14 THE COURT: And without telling me who you work for,
15 do you work for a private concern or a government agency.

16 THE PROSPECTIVE JUROR: Private concern.

17 THE COURT: Is it a law firm?

18 THE PROSPECTIVE JUROR: In-house counsel.

19 THE COURT: For a corporation?

20 THE PROSPECTIVE JUROR: For a corporation.

21 THE COURT: Is it a large corporation?

22 THE PROSPECTIVE JUROR: Yes, it is.

23 THE COURT: Before you worked for this employer did
24 you work as a legal secretary then, too?

25 THE PROSPECTIVE JUROR: Yes, I did.

Prospective Juror 91

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1 THE COURT: Was that for a law firm --

2 THE PROSPECTIVE JUROR: Law firm.

3 THE COURT: What was the kind of practice did they
4 have, if you remember?

5 THE PROSPECTIVE JUROR: Mostly corporate.

6 THE COURT: Not criminal?

7 THE PROSPECTIVE JUROR: Nothing criminal, no.

8 THE COURT: Thank you.

9 Now, you indicated the following answer to the
10 following question: Have you or any close friend or relative
11 ever been treated for substance abuse problem? You answered
12 yes. And you explained, all three of my sisters.

13 THE PROSPECTIVE JUROR: Yes.

14 THE COURT: Is this of recent vintage or something
15 that happened in the distant past?

16 THE PROSPECTIVE JUROR: Way in the distant past.

17 THE COURT: Have they resolved their --

18 THE PROSPECTIVE JUROR: They all resolved. They all
19 living normal lives and everything. They even have their
20 children back.

21 THE COURT: Very well. And so if you heard evidence
22 of drug trafficking in a case, would the experience of your
23 sisters with drugs have any effect on your ability to
24 impartially consider the evidence along with all the other
25 evidence?

Prospective Juror 91

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1 THE PROSPECTIVE JUROR: No. No, sir. I wasn't
2 around my sisters when they were on it. It's unfortunate
3 thing I wasn't -- well, it was fortunate that I wasn't around
4 them, but I always kept them up in my prayers.

5 THE COURT: So you think you could be fair and
6 impartial?

7 THE PROSPECTIVE JUROR: I could be fair and
8 impartial, yes.

9 THE COURT: In considering that kind of evidence?

10 THE PROSPECTIVE JUROR: Right, yes.

11 THE COURT: Let me ask you some questions about your
12 views on the death penalty. You know the death penalty is one
13 of two possible penalties if the defendant is found guilty in
14 the first phase of the trial of intentional and deliberate
15 murder, you understand that?

16 THE PROSPECTIVE JUROR: Yes, I do.

17 THE COURT: The way it works is that, in the first
18 phase of the trial the defendant will be tried for the
19 charges, which are three: the intentional deliberate murder of
20 another person, conspiracy to murder, and a weapons charge
21 related to the other two charges.

22 The government always has the burden of proof.

23 THE PROSPECTIVE JUROR: Right.

24 THE COURT: And it's required to prove beyond a
25 reasonable doubt that the defendant has committed each of

Prospective Juror 91

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1 those crimes.

2 THE PROSPECTIVE JUROR: Yes.

3 THE COURT: And the defense never has any burden to
4 provide any evidence, the defendant never has to testify.
5 Under our law, the burden is always on the government, it
6 never shifts to the defense. You understand that?

7 THE PROSPECTIVE JUROR: I understand that.

8 THE COURT: It must be a unanimous verdict of the
9 jury beyond a reasonable doubt, right?

10 THE PROSPECTIVE JUROR: Yes.

11 THE COURT: Okay. Now, if the defendant's found
12 guilty of the intentional murder charge, then there would be a
13 second trial with the same jury, and at that trial the only
14 two possibilities on the table would be a sentence -- it would
15 be a penalty phase -- a sentence of life in prison is the
16 presumed penalty, unless the government can demonstrate by
17 providing evidence to the jury of certain aggravating factors
18 that it wishes to put before the jury that the death penalty
19 is the appropriate penalty.

20 THE PROSPECTIVE JUROR: Correct.

21 THE COURT: The defense has the right, but is not
22 required to, present mitigating evidence; in other words,
23 evidence as to why the proper penalty continues to be life in
24 prison. Do you understand that?

25 THE PROSPECTIVE JUROR: Yes, I do.

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1 THE COURT: And so the jury will hear that evidence
2 and then it will have to deliberate on the penalty portion of
3 the case. And in order to impose the death penalty all 12
4 jurors would have to agree. If even one juror disagrees and
5 stands by the view that the penalty should be life in prison
6 without the possibility of release, then that's the penalty
7 that's imposed.

8 Do you understand that.

9 THE PROSPECTIVE JUROR: I understand that.

10 THE COURT: Now, you indicated the following views
11 about the death penalty, you said neither for it or against
12 it. Well, I am not God. I don't give life, therefore can't
13 take life.

14 THE PROSPECTIVE JUROR: That's correct.

15 (Continued next page)
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1 THE COURT: Okay. So, those two statements on the
2 same page would tend to be contradictory, wouldn't they?

3 THE PROSPECTIVE JUROR: Right, hmm.

4 THE COURT: When you say you're neither for it or
5 against it, what do you mean by that, in the context of your
6 second statement?

7 THE PROSPECTIVE JUROR: Well, I'm not partial to the
8 death penalty, nor am I against the death penalty, because my
9 view is, I don't believe that I can sit in judgment and judge
10 another person, because the death penalty is like you just
11 repeated, is either life in prison, or, you know, they kill
12 you, they take your life --

13 THE COURT: Right. And so --

14 THE PROSPECTIVE JUROR: -- and I don't know how it
15 would weigh upon my conscience if I was to take the latter.

16 THE COURT: Do you believe there is any time, any
17 circumstance, where you would consider the imposition of the
18 death penalty for someone convicted of intentional, deliberate
19 murder?

20 THE PROSPECTIVE JUROR: That's a hard question for
21 me to answer. But I know I have to answer it.

22 THE COURT: As best you can. There's no right or
23 wrong answer here.

24 THE PROSPECTIVE JUROR: I understand that. My
25 concern is, that person already took a life, and I don't

1 believe in an eye for an eye or a tooth for a tooth, which
2 is -- that was one of the adages that is also there. I don't
3 know, I guess it would have to be based upon the evidence
4 brought forth to the jury at the time of, you know, you going
5 into deliberation.

6 THE COURT: Well, if the government presented
7 certain aggravating factors --

8 THE PROSPECTIVE JUROR: Right.

9 THE COURT: -- and you believed that those factors
10 were compelling to the past behavior and character and record
11 of the defendant, and you considered some mitigating factors,
12 as well, and you felt that the aggravating factors totally
13 overwhelmed the mitigating factors, and I know this is
14 hypothetical, but is there a circumstance -- do you believe
15 there is some circumstance in which you would vote for the
16 death penalty if the aggravating factors that were presented
17 were so austere and serious that -- in that situation?

18 THE PROSPECTIVE JUROR: Yes, I believe so. If there
19 were extenuating situations, you know, circumstances that led
20 me to go to that extent, yes.

21 THE COURT: So, you could vote for the death
22 penalty --

23 THE PROSPECTIVE JUROR: I could vote for the death
24 penalty.

25 THE COURT: -- under some limited circumstances?

1 THE PROSPECTIVE JUROR: Right, under some limited
2 circumstances.

3 THE COURT: Is your view about the death penalty a
4 moral position or a religious position?

5 THE PROSPECTIVE JUROR: It's more of a religious
6 position.

7 THE COURT: Okay.

8 THE COURT: Any other questions?

9 MS. MERKL: Yes, your Honor.

10 (Sidebar.)

11 THE COURT: Yes.

12 MS. MERKL: Your Honor, the government would just
13 ask you to follow up with regard to Questions 86 and 87. The
14 juror, as she stated in her initial Question 85, stated:
15 "Again, I am neutral. Who are we to take a life?" She
16 indicated that it is her view that the person convicted of
17 life in prison without the possibility -- I'm sorry --
18 convicted of intentional and deliberate murder should receive
19 life in prison. She indicated that she thought that someone
20 who was convicted of deliberate and intentional murder should
21 receive life in prison, and she reiterated, and I quote,
22 her "consensus" -- this is what she stated on the witness
23 stand: "My consensus is that person already took a life, and
24 I don't believe in an eye for an eye." So, the government is
25 truly concerned that this juror would not be able to actually

1 impose the death penalty in a given case involving a single
2 deliberate murder. She stated she would be able to consider
3 it under limited circumstances. And the government would
4 request follow-up as to whether or not she's thinking of cases
5 of mass-murder, 9/11, categorical types of crimes that do not
6 actually make her death-qualified in a case such as this.

7 THE COURT: I'll go back and ask the question about
8 an individual murder.

9 MR. JASPER: I don't think there's any need to lead
10 into mass murder.

11 MS. MERKL: She was the one who stated "limited
12 circumstances," and I would ask you to follow up as to what
13 she meant.

14 THE COURT: That's fine.

15 (Continued on next page.)
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1 (In open court.)

2 THE COURT: Just one or two more questions.

3 You indicated earlier, when I asked you about
4 whether there were any circumstances in which you would
5 consider and vote for the death penalty, you said basically,
6 to paraphrase, that there might be some limited circumstances?

7 THE PROSPECTIVE JUROR: Hmm.

8 THE COURT: Is that right?

9 THE PROSPECTIVE JUROR: Yes, sir.

10 THE COURT: What kinds of limited circumstances do
11 you think might justify the imposition of the death penalty?

12 THE PROSPECTIVE JUROR: Voting against the death
13 penalty, or voting for it?

14 THE COURT: Voting for it. You indicated in your
15 questionnaire that, by and large, you believed that life in
16 prison without the possibility of release was an appropriate
17 sentence for the intentional murder of an individual. That's
18 what you said?

19 THE PROSPECTIVE JUROR: I guess my "limited
20 circumstances" would be killing of a child.

21 THE COURT: Is that it?

22 THE PROSPECTIVE JUROR: More or less, yes.

23 THE COURT: Anything else?

24 MS. MERKL: No, your Honor.

25 MR. JASPER: Yes, your Honor.

1 (Sidebar.)

2 THE COURT: Yes.

3 MR. JASPER: Obviously, your Honor just asked her if
4 she's aware of the fact that this is not a child-killing case,
5 obviously. Nevertheless, intentional murder, I would ask her
6 about a case in which a law enforcement official was sought to
7 be killed by a defendant, and the future danger, as well as
8 the organized crime factor, those three.

9 MS. MERKL: With all due respect, we're going down a
10 slippery slope with those questions.

11 MR. JASPER: We don't whether or not absolutely the
12 child killing is the only circumstance. She's here, so let's
13 just ask her.

14 THE COURT: Thank you.

15 (In open court.)

16 THE COURT: You understand that this case doesn't
17 involve the killing of a child?

18 THE PROSPECTIVE JUROR: Hmm.

19 THE COURT: You have to say yes or no.

20 THE PROSPECTIVE JUROR: Yes, sir.

21 THE COURT: And so, the kinds of aggravating factors
22 would not include anything to do with killing a child,
23 molesting a child, anything like that?

24 THE PROSPECTIVE JUROR: Okay.

25 THE COURT: If the defendant is found guilty of the

1 killing, intentional and deliberate killing of an adult, all
2 right, a single adult, then you would in this case have to
3 hear the second part of the case, which is the evidence of
4 aggravators and mitigators.

5 And so, let me ask you this: If you learned, for
6 instance, that the defendant was already serving a life
7 sentence for intentional murder, would that -- do you think
8 that would influence, as one factor -- I'm identifying one
9 factor. There may be many factors in each direction,
10 mitigating and aggravating -- would that factor have any
11 compelling effect on your consideration of the appropriate
12 penalty?

13 THE PROSPECTIVE JUROR: If he's already serving time
14 for murder?

15 THE COURT: Intentional murder, another murder.

16 THE PROSPECTIVE JUROR: And then he's on trial again
17 for another murder?

18 THE COURT: The murder that he's found guilty of in
19 this trial would be a second murder.

20 THE PROSPECTIVE JUROR: Whew.

21 THE COURT: Why ask easy questions?

22 THE PROSPECTIVE JUROR: You sure don't, sir. Well,
23 he's already in jail for a murder, and then he's on trial
24 for -- allegedly for another murder?

25 THE COURT: And he's been found guilty of the murder

1 for which he's on trial here, is the hypothetical.

2 THE PROSPECTIVE JUROR: Well, if he's found guilty
3 for the murder on the trial that he's here for, if they decide
4 on the death penalty, if I'm a juror -- I'm sorry, your Honor.
5 I'm just --

6 THE COURT: Take your time. Whatever you answer is
7 your answer. There's no correct answer.

8 THE PROSPECTIVE JUROR: No, there isn't. There
9 isn't a correct answer at all.

10 THE COURT: And I know you are having difficulty.

11 THE PROSPECTIVE JUROR: Yes.

12 THE COURT: Why do you think you're having
13 difficulty with the answer? That's my preliminary question.
14 Why is it a problem to be able to --

15 THE PROSPECTIVE JUROR: I guess because the death
16 penalty is a final act. The death penalty means you're taking
17 that person's life. But then, the way I look at it, is that
18 person worth the death penalty, or should he just spend the
19 rest of his life in prison. Either/or, his life is finished,
20 anyway. But the death penalty is a finality. It means it's a
21 closure. It's an end.

22 So, well, I guess, no, it wouldn't. That's my
23 answer.

24 THE COURT: No, you wouldn't consider the death
25 penalty?

1 THE PROSPECTIVE JUROR: No. The fact that he's
2 already in jail.

3 THE COURT: It wouldn't affect --

4 THE PROSPECTIVE JUROR: It wouldn't affect --

5 THE COURT: You wouldn't consider it a basis upon
6 which to impose the death penalty.

7 THE PROSPECTIVE JUROR: Exactly. I wouldn't
8 consider that. I hope that answered your question.

9 THE COURT: Well, it's your answer. Whatever your
10 answer is is your answer.

11 THE PROSPECTIVE JUROR: My answer. Thank you.

12 THE COURT: Anything else?

13 MS. MERKL: Nothing from the government, your Honor.

14 THE COURT: I see a wave. I don't see an answer.

15 MR. GOLTZER: I'm sorry, your Honor?

16 THE COURT: Is there an answer? Is there anything
17 else?

18 MR. GOLTZER: No, your Honor.

19 THE COURT: Thank you.

20 Okay. I want to thank you for coming in.

21 Mr. Recoppa will tell you what to do next. Have a lovely day.

22 THE PROSPECTIVE JUROR: Thank you very much.

23 (Prospective juror leaves courtroom.)

24 THE COURT: Motion?

25 MS. MERKL: The government would move to excuse this

1 juror for cause, your Honor. Based on the totality of her
2 "answer," quote, in the box and on the questionnaire, this
3 juror seems to be substantially impaired. She indicated she's
4 a Christian and she would have difficulty sitting in judgment.
5 That was her first answer. She stated, "I can't sit in
6 judgment and judge another person."

7 She also expressed extreme hesitation about whether
8 or not she would be able to impose the death penalty in a case
9 other than a child killing. The government would respectfully
10 submit this juror is substantially impaired.

11 MR. GOLTZER: Judge, I don't think she's
12 substantially impaired at all. We certainly don't want a
13 panel that can glibly or easily impose the death penalty.
14 Quite frankly, they are supposed to struggle with this issue,
15 it's supposed to be difficult, and that's exactly what we saw
16 here.

17 The bottom line is that she said she could impose
18 it. She could vote for it. She was aware this wasn't a
19 child-killing case. But this is also -- when you talk about
20 the slippery slope, we asked her about one aggravating factor.
21 We could ask her about more aggravating factors, if your Honor
22 wants to go down that road.

23 The bottom line is, she said she could impose the
24 death penalty, obviously not easily, but she could do it, and
25 that really is the bottom line with respect to the case law.

1 Was she substantially impaired? She's concerned about it.
2 She has views about it. And the fact that she said on here
3 that she was a Christian, quite frankly, there are many people
4 who have religious views and they differ with their church and
5 their spiritual advisors. We've seen that time and time
6 again, as well. So, she did not indicate that her religious
7 belief would be the end-all answer to this particular issue.

8 MS. MERKL: Your Honor, I'm certainly not maligning
9 the juror because she's a Christian. By no means was that the
10 import of what I was suggesting.

11 I was just stating, based on way she phrased her
12 answers, she seemed to have extreme difficulty with the notion
13 of sitting in judgment of another person, which is not an
14 uncommon theme among certain branches of Christianity.

15 With regard to Mr. Jasper's suggestion that we
16 continue to inquire about aggravating circumstances, the
17 government would just respectfully remind Mr. Jasper that your
18 Honor included the questions in the questionnaire regarding
19 specific aggravating facts in this case in order to reveal
20 juror bias with respect to whether those persons would remain
21 life-qualified if they were faced with specific aggravating
22 circumstances. He was concerned whether or not specific
23 aggravating circumstances would cause certain jurors to, in
24 Mr. Jasper's words, become automatic killers. The questions
25 are not designed as to the aggravators in order to attempt to

1 rehabilitate jurors who are otherwise substantially impaired.

2 I think that even the most staunch opponent of the
3 death penalty could potentially dream up a case involving a
4 congregation of aggravating factors in which they could
5 conceivably impose the death penalty. But that's not the
6 test. The test is whether the juror is substantially
7 impaired, whether there's an obstacle, based on her own views,
8 as to whether she could impose the death penalty. The jurors
9 have to be life-qualified and death-qualified, and based on
10 the totality of the record, the government submits that Juror
11 No. 91 is not death-qualified.

12 MR. JASPER: Judge, very briefly, we have to ask
13 questions that specifically deal with the case, as your Honor
14 pointed out and, as some of these jurors have pointed out, the
15 difficulty of asking these questions in a vacuum. We have to
16 have a baseline. Otherwise, it just becomes totally abstract.
17 It's one thing in the case law and in law schools to be
18 thinking about stake-out and case-specific. This is very real
19 for us, and the only way we can get at the views is by asking
20 these questions, as your Honor is more than well aware.

21 THE COURT: All right. Thank you.

22 MS. MERKL: Thank you.

23 THE COURT: First of all, there's nothing abstract
24 at all about what this and the other jurors have been
25 questioned to tell us about. It's in a sixty-eight page

1 questionnaire. And the objective of the voir dire here is to
2 bring out any ambiguities, inconsistencies, and deal with a
3 lack of response on the part of the jurors, and to learn about
4 the demeanor of the juror, to learn about the attitudes of the
5 juror, to observe the behavior of the juror, and to get a
6 overall picture, because otherwise, we could just decide all
7 this on questionnaires and never talk to anybody.

8 So, I think that it's extremely important, as in the
9 case of this juror, that the Court inquire and try to put the
10 juror at ease about the questions, indicating that there's no
11 right or wrong answer, and making it possible for the juror to
12 think through a problem. I even asked a question about what
13 the juror was basically concerned about in answering a
14 question at one point.

15 What we have with this juror is someone who can't
16 think of anything or appears not to be able to think of any
17 type of crime that would justify the death penalty, except the
18 murder of a child. The questionnaire is ridden with the view
19 that the juror is not able, as a Christian or otherwise, to
20 impose the death penalty.

21 And I observed the juror's demeanor. She tried very
22 hard, but she a hesitated at every turn when it came to any
23 issue involving the imposition of the death penalty. And
24 while she may have agonized, the agonizing was because it
25 appears that she's substantially impaired and would not impose

Prospective Juror # 94

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1 the death penalty in these circumstances even if she learned
2 of the defendant's -- a defendant's prior murder, intentional
3 murder, of an individual and the fact that the person was
4 serving a life sentence.

5 So, the motion is granted. The juror is struck.

6 MR. GOLTZER: May we take five, sir?

7 THE COURT: Sure. Let's take five minutes.

8 (Recess taken.)

9 (In open court.)

10 THE COURT: The next one is?

11 THE CLERK: We're up to Juror No. 94.

12 (Prospective Juror No. 94 entered the courtroom.)

13 THE COURT: Please be seated, ma'am. Good morning.

14 THE PROSPECTIVE JUROR: Good morning.

15 THE COURT: You are Juror No. 94?

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: Let me just ask you this: I remind you
18 that you are still under oath.

19 THE PROSPECTIVE JUROR: Yes.

20 THE COURT: Let me just ask you: Have you read,
21 seen, heard about, observed anything about this case since you
22 filled out your questionnaire?

23 THE PROSPECTIVE JUROR: No.

24 THE COURT: I just have some follow-up questions for
25 you in connection with your jury service.

Prospective Juror # 94

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1 You indicated that in 1997, you were a juror in a
2 civil trial; is that right?

3 THE PROSPECTIVE JUROR: Yes. I was an alternate.

4 THE COURT: An alternate. So, you never deliberated
5 with the jury?

6 THE PROSPECTIVE JUROR: No, I did not.

7 THE COURT: Do you know what kind of trial it was?

8 THE PROSPECTIVE JUROR: Something about a car
9 accident.

10 THE COURT: I see. Now, you indicate that you are a
11 senior court clerk for the family court; is that right?

12 THE PROSPECTIVE JUROR: Yes.

13 THE COURT: How many persons are in that category?
14 Is this in New York City?

15 THE PROSPECTIVE JUROR: It's a state. New York
16 State.

17 THE COURT: Okay. What county are you in?

18 THE PROSPECTIVE JUROR: Queens.

19 THE COURT: You're in Queens?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: How many senior court clerks are there?

22 THE PROSPECTIVE JUROR: In my building?

23 THE COURT: Yes.

24 THE PROSPECTIVE JUROR: Maybe twenty-five.

25 MR. GOLTZER: Judge, could I have a minute with

Prospective Juror # 98

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1 Mr. Goltzer?

2 (Pause.)

3 MR. GOLTZER: No questions.

4 THE COURT: Do you have any questions?

5 MS. MERKL: No questions.

6 THE COURT: Okay. That's it. Thanks for coming in.

7 Have a nice day. Mr. Recoppa will tell you what to do next.

8 THE PROSPECTIVE JUROR: Thank you.

9 (Prospective Juror No. 94 leaves courtroom.)

10 THE COURT: Is there a consent to strike this juror
11 based on anonymity problems?

12 MS. MERKL: Yes, your Honor.

13 MR. GOLTZER: Yes, your Honor.

14 THE COURT: Thank you. The juror is struck based on
15 anonymity problems.

16 98 is next.

17 (Prospective Juror No. 98 entered the courtroom.)

18 THE COURT: Please be seated, sir. Good morning.

19 THE PROSPECTIVE JUROR: Good morning.

20 THE COURT: You are Juror No. 98? You have to say
21 yes or no.

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: Okay. I remind you that you are still
24 under oath, and let me ask you, have you read or heard or
25 learned anything about this case since you filled out the

Prospective Juror # 98

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1 questionnaire?

2 THE PROSPECTIVE JUROR: I had saw one article in the
3 Daily News. I looked at it.

4 THE COURT: What was it about?

5 THE PROSPECTIVE JUROR: Questionnaires or whatever,
6 staples being taken out of the questionnaires or whatever,
7 something like that in the paper.

8 THE COURT: That's it?

9 THE PROSPECTIVE JUROR: That's pretty much it, yes.

10 THE COURT: If you see any further articles, just
11 pass them up, and go to sports or finance or whatever.

12 THE PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: You indicated that you have had your
14 present job for twenty-two years; is that right?

15 THE PROSPECTIVE JUROR: Yes, that's correct.

16 THE COURT: And you deliver goods; is that right?

17 THE PROSPECTIVE JUROR: Hmm. Yes.

18 THE COURT: And without telling me who you work for,
19 is this a private company that does deliveries that you work
20 for?

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: Is this like a retailer, or is this just
23 a cargo company that delivers goods?

24 THE PROSPECTIVE JUROR: Something like a cargo
25 company.

Prospective Juror # 98

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1 THE COURT: You indicated that your wife works as a
2 911 dispatcher; is that right?

3 THE PROSPECTIVE JUROR: Yes.

4 THE COURT: Do you discuss your wife's work with her
5 when she comes home?

6 THE PROSPECTIVE JUROR: Once in a while.

7 THE COURT: Do you think that the nature of her work
8 and your discussions would have any effect on your ability to
9 be fair and impartial in a criminal case?

10 THE PROSPECTIVE JUROR: I don't think so.

11 THE COURT: You also indicated that you were a juror
12 in a federal criminal trial involved with arms dealing back in
13 1988; is that right?

14 THE PROSPECTIVE JUROR: Yes.

15 THE COURT: Without telling me what the verdict was,
16 did you deliberate to a verdict?

17 THE PROSPECTIVE JUROR: I believe they did. I was
18 an alternate.

19 THE COURT: You were an alternate. Okay.

20 You indicated the following answer to the following
21 question: "Have you or anyone you know had experience with
22 illegal gambling using either video poker machines or
23 bookmaking?" And you answered "Yes." Is that correct?

24 THE PROSPECTIVE JUROR: What was the question?

25 THE COURT: "Have you or anyone you know had

Prospective Juror # 98

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1 experience with illegal gambling using either video poker
2 machines or bookmaking?"

3 THE PROSPECTIVE JUROR: I guess I might know a
4 friend that gambles somewhat.

5 THE COURT: I see. But you don't gamble in this
6 way?

7 THE PROSPECTIVE JUROR: No. No. No.

8 THE COURT: You're smiling. Why are you smiling?

9 THE PROSPECTIVE JUROR: I remember running into my
10 friend at OTB this past weekend. He bets a crazy amount of
11 money. I think he does it on line, too, you know. But I
12 don't do that.

13 THE COURT: Does OTB still operate? I thought it
14 was out of business.

15 THE PROSPECTIVE JUROR: It's still operating.

16 THE COURT: Really?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: You said you think he gambles on line.
19 You mean offshore?

20 THE PROSPECTIVE JUROR: I believe that's how he does
21 it, yes.

22 THE COURT: Do you participate in that at all?

23 THE PROSPECTIVE JUROR: No. The last time I saw
24 him, he was betting on soccer games in Europe or whatever. I
25 think he has a serious problem, you know.

Prospective Juror # 98

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1 THE COURT: Now, let me ask you some questions about
2 your responses on the death penalty.

3 THE PROSPECTIVE JUROR: Aha.

4 THE COURT: You indicated your views on the death
5 penalty as follows: "As I've gotten older, I think my feeling
6 on the death penalty has changed. Life in prison seems
7 horrible enough. Seeing people getting off of death row,
8 because of new DNA data"?

9 THE PROSPECTIVE JUROR: There's been some mistakes
10 with the death penalty in the past, I guess, and new evidence
11 is coming out.

12 THE COURT: Well, let me just tell you how this
13 trial will work. Once a jury is impaneled, the government
14 will provide the jury with evidence at the first phase of the
15 trial. It's called the guilt phase, for want of a better
16 term. The government has the obligation of proving that the
17 defendant is guilty beyond a reasonable doubt unanimously to
18 the jury before the defendant can be convicted.

19 THE PROSPECTIVE JUROR: Hmm.

20 THE COURT: And the defense never has any obligation
21 whatsoever. They have no obligation to provide any evidence.
22 The defendant has no obligation to testify. The burden is
23 always on the government to provide the evidence to prove that
24 the defendant is guilty of the crime charged. And there are
25 three crimes charged here. There's murder, intentional and

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1 deliberate murder of another person; there's conspiracy to
2 commit murder; and there's a weapons charge associated with
3 the other two charges.

4 So, assuming that the government proves its case and
5 the defendant is found guilty after the jury deliberates, then
6 there would be a second phase of the trial, which is called
7 the penalty phase, and at that phase of the trial, the jury
8 will be asked to consider certain aggravating, and -- what are
9 called aggravating and mitigating factors about the
10 defendant's background.

11 The government will provide the jury with evidence
12 of what they call aggravating factors -- information on the
13 defendant's background, record, characteristics and other
14 circumstances -- that it believes are sufficient for the jury
15 to, instead of rendering a verdict of life in prison, to
16 render the more serious verdict, the greater verdict, of the
17 death penalty.

18 The defense has the right at the second trial to
19 provide the jury with mitigating factors. It's not required
20 to, but it may decide to, which would -- they would argue,
21 inform the jury, that the appropriate sentence is life in
22 prison without the possibility of release because those
23 factors outweigh or in some way limit the aggravating factors.
24 And the jury will have to decide whether to impose the death
25 penalty or to impose a sentence of life in prison without the

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1 possibility of release.

2 Now, if the jury returns a verdict of guilty of
3 intentional and deliberate murder in the guilt phase and we
4 proceed to a penalty phase, where you receive evidence of
5 aggravating factors and mitigating factors, after hearing
6 those -- that evidence, could you impose a penalty of death on
7 a defendant who killed -- sorry -- was convicted of the
8 killing, deliberately and intentionally, of an individual?

9 THE PROSPECTIVE JUROR: I'm not sure. I would have
10 to, I guess, hear all the evidence. I'm not sure.

11 THE COURT: Could you impose a penalty of life in
12 prison in that situation?

13 THE PROSPECTIVE JUROR: It's possible, sure.

14 THE COURT: Well, this is not a case of accidental
15 murder --

16 You understand?

17 THE PROSPECTIVE JUROR: Hmm.

18 THE COURT: -- where the accusation, at least, is
19 that this was intentional murder. So, the government would
20 have to prove beyond a reasonable doubt that the defendant
21 intentionally committed this murder. So, do you think that
22 for intentional murder, that life in prison -- I think you
23 said in one of your answers life in prison seems horrible
24 enough. So, is life in prison satisfactory to you as a
25 punishment for committing an intentional murder?

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1 THE PROSPECTIVE JUROR: It's a tough question for
2 me. I don't know, you know. I guess so.

3 THE COURT: Well, are there -- can you imagine any
4 circumstances where you think the death penalty would be
5 justified in principle?

6 THE PROSPECTIVE JUROR: That stuff in Arizona there
7 and how the guy who shot the politician and those people
8 there, it seems to me like, what I know of the case, that he
9 deserves the death penalty, you know.

10 THE COURT: So --

11 THE PROSPECTIVE JUROR: They were innocents.

12 THE COURT: One was a child. Let's take the child
13 out of the picture for a second. Other than the child, maybe
14 how many people were killed, five other people? So, would you
15 possibly impose the death penalty where someone committed
16 multiple murders at the same time? Is that the sort of case
17 where you would consider imposing the death penalty?

18 THE PROSPECTIVE JUROR: I would probably be more
19 likely, yes.

20 THE COURT: Is there any number that you have in
21 mind?

22 THE PROSPECTIVE JUROR: Number, no.

23 THE COURT: Is there anything about that incident,
24 other than the number of people killed, that would have
25 influenced you to impose the death penalty, about the

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1 circumstances, for instance?

2 THE PROSPECTIVE JUROR: It seemed like innocent
3 people just going about their lives there, and they were
4 brutally murdered, they were hurt and caused harm to.

5 THE COURT: What if these persons were somehow
6 involved in the drug business or in other illegal activities?

7 THE PROSPECTIVE JUROR: Then, I might feel
8 differently about it.

9 THE COURT: You mentioned that -- you answered a
10 question in which you said -- the question was "Have you ever
11 held a different view on the death penalty?" And you said --
12 let me go back.

13 "Do you believe in the adage of an eye for an eye?
14 And you said "No. To hurt someone because they have hurt you
15 doesn't always make you feel better." And then you said
16 "You hurt or harm me or my loved ones, I hurt and harm you."

17 "Have you ever held a different view on the death
18 penalty?" And you said "I was all for it," and in
19 parentheses, "(DNA data, false testimony, one innocent
20 sentence to die is wrong)."

21 So, my question of you is: Would you only impose
22 the death penalty if there were DNA evidence that would link
23 the defendant to the murder of the victim?

24 THE PROSPECTIVE JUROR: I guess if the facts were
25 there and everything, I guess I could. It wouldn't always

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1 have to be DNA. I guess, if there were witnesses or whatnot.
2 I just -- my opinion on it has changed since I've gotten
3 older. It seems like there's always appeals and whatnot and
4 this and that, and it seems to drag on and drag on. Life in
5 prison, I mean, seems pretty cruel in itself.

6 THE COURT: You agree that life in prison is a
7 lesser penalty than the death penalty?

8 THE PROSPECTIVE JUROR: I don't know if it's a
9 lesser penalty. I don't know.

10 THE COURT: Why not?

11 THE PROSPECTIVE JUROR: It's pretty miserable being
12 can in that cell all that day, being around those people all
13 day long, these con victims and whatnot.

14 THE COURT: So, you think the greater penalty is
15 life in prison?

16 THE PROSPECTIVE JUROR: It's possible, to some.

17 THE COURT: If I instruct you that the law that you
18 must apply is that the death penalty is a greater penalty than
19 life in prison, would you follow the law?

20 THE PROSPECTIVE JUROR: I guess I would have to.

21 THE COURT: Did that arms-dealing case that you were
22 involved in have any connection to organized crime?

23 THE PROSPECTIVE JUROR: No.

24 THE COURT: Does anyone have any questions?

25 MR. JASPER: Yes, your Honor.

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1 (Sidebar.)

2 THE COURT: Yes.

3 MR. JASPER: Judge, in asking him whether or not he
4 will be able to consider the death penalty in certain cases,
5 he mentioned the Arizona shooting involving innocents. Your
6 Honor correctly pointed out, Take the child out of it. He
7 seemed to focus on numerous killings. There's going to be
8 evidence that Mr. Basciano has killed more than just this one
9 person.

10 If you could just ask him whether or not he could
11 consider the death penalty in a case where a defendant was --
12 there would be evidence of numerous murders and conspiracies
13 to commit murder, including solicitation of a law enforcement
14 official -- the murder of a law enforcement official, without
15 using the word "solicitation," and the cooperating witnesses,
16 because I believe some of the 3500 indicates that Mr. Basciano
17 approached Mr. Massino and asked for permission to kill the
18 parents of the one of the cooperating witnesses, and that's
19 pretty clear in the 3500 material, and the children.

20 THE COURT: What children?

21 MR. JASPER: Children.

22 MR. GOLTZER: The adult children of a cooperator,
23 not a minor child.

24 THE COURT: Not minor children.

25 MR. DENNEHY: The offspring.

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1 THE COURT: The offspring?

2 MR. GOLTZER: Adult offspring.

3 MS. MERKL: This juror reminds the government of
4 Juror No. 16, who your Honor ultimately determined was
5 substantially impaired, despite efforts by the defense to ask
6 him an escalating series of questions regarding aggravating
7 factors and whether or not that might bring him back -- to use
8 Mr. Jasper's words -- into the realm of people who might
9 consider the death penalty.

10 This juror stated repeatedly on his questionnaire
11 that life in prison is enough, and when asked for a specific
12 example of a case in which he would consider the death
13 penalty, the only case he could come up with was the recent
14 mass murder, that was extremely violent and arbitrary.

15 The government would request that the Court ask him
16 unequivocally if he could impose the death penalty in a case
17 involving a single intentional murder. And if your Honor is
18 inclined to go into the aggravators, which the government
19 doesn't think is necessary, we would ask that you also ask him
20 about mitigating factors. If your Honor does ask about
21 aggravators, we would certainly ask they not be asked in
22 combination for the reasons that your Honor stated in your
23 opinion. To start asking about mitigating in combination
24 starts to border on stake-out.

25 THE COURT: You mean aggravators?

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1 MS. MERKL: That's what I mean, aggravators in
2 combination.

3 MR. GOLTZER: I agree that aggravating shouldn't be
4 asked in combination. They would be asked quite separately.
5 That's what I prefer, the idea that aggravators not be gone
6 into because of stake-out.

7 The aggravators are being used to justify to have
8 the death penalty for Mr. Basciano. We have to ask them to
9 see if they have a view on life or death. That's the only
10 reason I raised them right now. He seems to be focused on
11 number of killings, and the government can't just stand here
12 and act as if it's the sole one murder and they are not going
13 to claim that Basciano killed a whole bunch.

14 MS. MERKL: Unless the defense is conceding that all
15 of that evidence is coming in, it's not appropriate.

16 THE COURT: What evidence?

17 MS. MERKL: The evidence of the other murders, the
18 evidence of all the other solicitations. We don't expect that
19 Mr. Jasper and Mr. Goltzer are going to stand by idly when the
20 government seems to admit that evidence.

21 MR. GOLTZER: May I say something? If the
22 government knows it's not going to use particular evidence, if
23 they told us now, we would be able to formulate better
24 questions, and it would be better for the Court. We sit here
25 with a February 25 letter that talks about twenty-five acts of

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1 violence committed by Mr. Basciano, and that's going to be put
2 in in the penalty phase. There is been no ruling. We can't
3 assume it's not.

4 THE COURT: Has there been a motion?

5 MR. GOLTZER: Liability hearings, yes.

6 MS. MERKL: There was a motion for a liability
7 hearing, and your Honor indicated that we were to file an
8 affidavit.

9 THE COURT: I understand your point. Okay. Thank
10 you.

11 (Continued on next page.)
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Juror # 98

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1 (In open court.)

2 THE COURT: I just have a couple of more questions
3 for you, going back to what you said about Tucson.

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: What happened in Tucson? Were there any
6 aspects of that incident that are particularly troubling to
7 you and are the basis for your statement that in a situation
8 like that, you could possibly impose the death penalty?

9 THE PROSPECTIVE JUROR: What is the question?

10 THE COURT: What about that incident is so troubling
11 to you that it might if you were on a jury in that case, that
12 you might vote to impose the death penalty if it were
13 available?

14 THE PROSPECTIVE JUROR: Just the fact that I -- it
15 seemed like it was all innocent people there, just going about
16 their daily lives there. Whatever they were doing there.
17 Just doing their jobs or whatever. The politician in one and
18 these people, the organizers or whatever, who is this guy to
19 target them, you know.

20 THE COURT: If at a penalty phase you heard evidence
21 that the defendant had committed another intentional murder,
22 in addition to the one which you just found him guilty of, and
23 that he was serving a life sentence, hypothetically, might
24 that affect your judgment as to whether to impose the death
25 penalty?

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Juror # 98

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1 THE PROSPECTIVE JUROR: I don't think so.

2 THE COURT: If the person committed several murders
3 of people who were his associates in crime or who were
4 involved in other crimes, would that affect you in such a way
5 that you might be more likely look to impose the death
6 penalty?

7 THE PROSPECTIVE JUROR: I guess if you see a pattern
8 like that, I guess it would, sure.

9 THE COURT: If there were several murders or
10 attempted murders along the way, let's say of drug dealers? I
11 am not saying it's the case here.

12 THE PROSPECTIVE JUROR: Absolutely. I guess it
13 would be the situation, if I found the facts to be what they
14 were, I guess I could.

15 THE COURT: What if you learned that the defendant
16 had some sort of family history, where he was mistreated as a
17 child, abused and had a difficult upbringing, spent time in
18 foster homes, in your view, would that be a mitigating factor
19 which might be balanced in favor of life in prison?

20 THE PROSPECTIVE JUROR: Would that be a mitigating
21 balance of what?

22 THE COURT: In other words, would that offset --

23 THE PROSPECTIVE JUROR: Offset my decision on that?

24 THE COURT: Offset the aggravating factors if you
25 learned of a mitigator like that. It is considered a

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1 mitigator if someone has had a troubled childhood and has been
2 abused and so forth.

3 Assume that's a mitigator. Would that be the kind
4 of mitigator that would counterbalance some of the aggravating
5 factors that you might hear?

6 THE PROSPECTIVE JUROR: I guess it might possibly.

7 THE COURT: Is it likely?

8 THE PROSPECTIVE JUROR: I have to know all the
9 facts, I guess, and the evidence.

10 THE COURT: Okay. What if you were told that the
11 defendant attempted or threatened to kill cooperating
12 witnesses against him, would that have any effect on your
13 consideration, your analysis, one way or the other?

14 THE PROSPECTIVE JUROR: I don't think so.

15 THE COURT: Okay. Anything else?

16 MS. MERKL: Nothing from the government, Your Honor.

17 MR. JASPER: Nothing, Your Honor.

18 THE COURT: Thank you for coming in. Have a nice
19 day. Mr. Reccoppa will tell you what to do next.

20 THE PROSPECTIVE JUROR: Take care.

21 (Juror leaves courtroom.)

22 THE COURT: Motion?

23 MS. MERKL: The government moves to strike this
24 juror for cause, Your Honor.

25 He indicated repeatedly in his questionnaire that he

Juror # 98

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1 felt like prison is sufficient punishment for an individual
2 convicted of a single deliberate murder. Only when Your Honor
3 escalated it to several murders or attempted murders did the
4 juror reluctantly state that I guess I could consider imposing
5 the death penalty.

6 The defendant -- the witness also -- sorry. The
7 juror also indicated that he would not consider the death
8 penalty in the face of the aggravators that Mr. Jasper
9 inquired, that the Court asked about.

10 Under these circumstances, under the totality of the
11 record, this juror seems impaired.

12 THE COURT: Okay. Mr. Jasper?

13 MR. JASPER: Your Honor, we think that this juror is
14 perfectly qualified to sit. He gave balanced answers. He
15 said that certainly the number of people is something that he
16 could consider in terms of the death penalty. He was not a
17 great admirer of the death penalty, nor does a qualified juror
18 have to be. He was balanced. He said consistently that he
19 would have to hear all of the facts and, again, Your Honor, I
20 just think that for us to -- for the government to make it
21 appear as though this is a sole single solitary murder case
22 when we know that they are going to be putting in all kinds of
23 uncharged conduct, at both phases, that indicate that there
24 are numerous murders or conspiracies, just doesn't seem to fit
25 when we talk about these jurors.

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1 This juror said that he could impose the death
2 penalty and he did it in a balanced way.

3 THE COURT: Anything else?

4 MS. MERKL: Under Your Honor's ruling, the only
5 things we know are coming in in the guilt phase is the murder
6 of Frank Santoro and the attempted murder of David Nunez is
7 out. So we know that the murder of Frank Santoro is coming
8 in. We know that a solicitation to kill a couple of
9 individuals is in, who I would note were not killed and who
10 this juror indicated -- this juror indicated that the attempt
11 to kill or threats to kill cooperating witnesses would have no
12 impact on his deliberations and that a single additional
13 murder would also not impact his deliberations.

14 For the defense to try to shoehorn this case into a
15 mass murder case of the sort that this juror would consider
16 imposing the death penalty is a gross misstatement of the
17 facts and just does not address the fact that this juror is
18 not substantially impaired.

19 This juror reminds me substantially of juror number
20 16 about whom Your Honor wrote in the opinion issued just this
21 morning, where we can come up with all kinds of escalating
22 hypotheticals. It doesn't make the person death qualified.

23 THE COURT: Thank you.

24 Anything else?

25 MR. JASPER: Your Honor, what has been noticed here

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1 in the February 19th letter for the penalty phase are numerous
2 acts of continued violence that this juror I'm sure I think
3 will be able to take into consideration in imposing the death
4 penalty. He gave a balanced view regarding life and death and
5 he's qualified in our view.

6 THE COURT: Okay. Thank you, everybody.

7 First of all, I would take issue with Mr. Jasper's
8 description of this juror being perfectly qualified. I don't
9 think he's perfectly qualified; but I also don't think that he
10 is substantially impaired.

11 I think based on his demeanor that he is somewhat
12 cavalier or offhanded and seemed to be somewhat unresponsive
13 in providing his views. But based on the questionnaire and
14 his statements here in court, I think that he is certainly not
15 an example of someone who based on moral principle could not
16 impose the death penalty in some circumstances.

17 I am trying to avoid a situation where I provide
18 individual jurors with a laundry list of aggravators and
19 mitigators because we are not trying the penalty phase here.
20 We are trying to get a sense of the philosophy, the thinking,
21 the flexibility of the jurors to decide whether they are both
22 qualified to impose the death penalty and qualified to impose
23 life in prison without the possibility of release.

24 Although I think that the demeanor of this juror is
25 problematical, generally, and I am not sure whether he is

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Prospective Juror #103

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1 taking this process as seriously as I would prefer, he hasn't
2 demonstrated that he is substantially impaired.

3 Therefore, the motion is denied.

4 102. 102 is not here?

5 Let's bring this person in. 103, please.

6 (Juror present.)

7 THE COURT: Please be seated, sir.

8 THE PROSPECTIVE JUROR: Thank you.

9 THE COURT: Good afternoon.

10 You are juror number 103, is that right?

11 THE PROSPECTIVE JUROR: Correct.

12 THE COURT: All right. I remind you that you are
13 still under oath.

14 Let me ask you, in the time between the day you
15 filled out the questionnaire and today, have you read, seen,
16 heard about, become aware of, anything about this case?

17 THE PROSPECTIVE JUROR: No.

18 THE COURT: Okay. Thank you.

19 You indicated in your questionnaire that you are
20 self-employed for the last three years in the home improvement
21 business. Is that right?

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: So basically you work alone or with a
24 few other people?

25 THE PROSPECTIVE JUROR: A few other people.

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Prospective Juror #103

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1 THE COURT: I see.

2 You answered no to the question, do you have an
3 unusual financial hardship or other serious problem that would
4 prevent you from serving as a juror in this case.

5 You said no.

6 THE PROSPECTIVE JUROR: Nothing unusual, I guess.

7 THE COURT: If you were required to serve for six
8 weeks, for instance, would that have a detrimental effect on
9 your ability to earn a living and would that be something that
10 you could endure?

11 THE PROSPECTIVE JUROR: It would have a detrimental
12 effect on my ability to earn a living, correct, yes.

13 THE COURT: But you don't view that as a substantial
14 hardship?

15 THE PROSPECTIVE JUROR: Depends on what I have lined
16 up for those six weeks, I guess.

17 THE COURT: You work jobs as they come along?

18 THE PROSPECTIVE JUROR: Right, correct.

19 THE COURT: So there are times when you are not
20 working; there are times when you are working?

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: You are used to periods of
23 non-employment as opposed to unemployment?

24 THE PROSPECTIVE JUROR: Yes.

25 THE COURT: Okay.

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Prospective Juror #103

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1 THE PROSPECTIVE JUROR: Can I say something?

2 I served on my state jury over the summer. I just
3 don't have the sheet. I was going to go there and get it. Is
4 that -- does that mean anything? Do I still have to sit
5 through this until I get the sheet?

6 THE COURT: What court was that in?

7 THE PROSPECTIVE JUROR: The Staten Island -- in
8 Staten Island.

9 THE COURT: You served on jury duty?

10 THE PROSPECTIVE JUROR: Correct, yes.

11 THE COURT: For how long?

12 THE PROSPECTIVE JUROR: A day.

13 THE COURT: A day.

14 THE PROSPECTIVE JUROR: But I still got the stamp
15 that I served.

16 THE COURT: That you served?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: If you could be excused based on your
19 state jury service you would like to do so, is that it?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: Let me ask you the questions and we will
22 figure that out.

23 THE PROSPECTIVE JUROR: Okay.

24 THE COURT: Okay. We certainly will look into it
25 and if you provide us with a copy of your certificate and we

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Prospective Juror #103

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1 can take it further, the jury clerk will deal with that
2 downstairs.

3 THE PROSPECTIVE JUROR: Okay.

4 THE COURT: Okay?

5 THE PROSPECTIVE JUROR: Yes.

6 THE COURT: Now, you have a friend who is a police
7 officer?

8 THE PROSPECTIVE JUROR: Yes.

9 THE COURT: Do you discuss his work with him?

10 THE PROSPECTIVE JUROR: No, not really.

11 THE COURT: You answered the following question in
12 the following way: Have you formed an opinion as to the
13 defendant based on anything that you have seen, heard or read?

14 You answered, yes, that he is associated with a mob
15 crime syndicate.

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: What leads you to reach that conclusion?

18 THE PROSPECTIVE JUROR: The charges against him.

19 THE COURT: Now, do you think that would create a
20 problem for you in being fair and impartial in considering the
21 evidence in this case?

22 THE PROSPECTIVE JUROR: I am guessing the charges
23 aren't baseless.

24 THE COURT: You understand that in order to find a
25 defendant guilty of a crime, it is necessary for the

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Prospective Juror #103

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1 government, which always has the burden of proof, to prove to
2 the jury beyond a reasonable doubt that the crime that is
3 charged was committed?

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: All right. And that in this case there
6 are three crimes charged, murder, intentional and deliberate
7 murder of an individual; conspiracy to commit murder; and a
8 weapons charge in connection with the other two charges.

9 THE PROSPECTIVE JUROR: Okay.

10 THE COURT: So would you be able to put aside any
11 surmise or thoughts that you might have about the defendant's
12 associations in connection or alleged associations in
13 connection with any crime syndicate and just decide the case
14 on the evidence that the government presents to you in this
15 trial, in this courtroom?

16 THE PROSPECTIVE JUROR: Yes, yes. That sounds
17 reasonable.

18 THE COURT: Okay. You also indicated this answer:
19 Do you have any bias, sympathy or prejudice with reference to
20 the defendant Vincent Basciano that would make it difficult
21 for you to render a fair and impartial judgment based solely
22 on the evidence presented at trial?

23 You said yes, and you explained, I have an
24 unfavorable opinion of organized crime.

25 THE PROSPECTIVE JUROR: Right.

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1 THE COURT: So going back to my previous question.

2 THE PROSPECTIVE JUROR: Correct, yes.

3 THE COURT: Would you think that your opinion of
4 organized crime would affect your ability to weigh the
5 evidence of guilt or non-guilt for the crimes that are
6 actually charged in this case?

7 THE PROSPECTIVE JUROR: Yes, I think so, yes.

8 THE COURT: Why is that?

9 THE PROSPECTIVE JUROR: Well, just from the
10 implications that if one is associated with organized crime,
11 then one is more than likely guilty of the charges against
12 him.

13 THE COURT: Do you think you could put that --

14 THE PROSPECTIVE JUROR: I mean, I might be able to
15 put it aside. I mean, it is not a -- but probably not.

16 MR. JASPER: No questions, Judge.

17 THE COURT: Okay. I want to thank you for coming
18 in. You have a nice day.

19 Mr. Reccoppa will tell you what to do next.

20 THE PROSPECTIVE JUROR: Thank you.

21 (Juror leaves courtroom.)

22 THE COURT: Is there a motion?

23 MR. JASPER: Yes, Your Honor.

24 Strike for cause.

25 MS. MERKL: No objection, Your Honor.

1 THE COURT: All right. Number 103 is struck for
2 cause.

3 I am going to check on the question of whether a
4 juror can be excused or must be excused if requested based on
5 recent state jury service.

6 MR. GOLTZER: I am checking it now. I'll check.

7 THE COURT: All right.

8 THE LAW CLERK: I think it's four years.

9 THE COURT: I've always believed that there was a
10 window. My clerk mentions it's four years. But there was a
11 window during which if you previously served, you are not
12 obligated to serve on jury duty in a different court. So
13 federal or state.

14 MS. MERKL: I think he's now served in both.
15 Because he has been excused. So I think his jury service here
16 is done.

17 THE COURT: Yes. I am talking about other potential
18 jurors.

19 MS. MERKL: Yes. I am just joking around, Your
20 Honor.

21 THE COURT: All right. The next one.

22 THE CLERK: 104.

23 THE COURT: 104.

24 (Continued on the next page.)
25

Prospective Juror #104

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1 (Juror number 104 is present.)

2 THE COURT: Please be seated, sir.

3 Good afternoon.

4 THE PROSPECTIVE JUROR: Good afternoon.

5 THE COURT: You are juror number 104, is that right?

6 THE PROSPECTIVE JUROR: That's correct.

7 THE COURT: I remind you that you are still under
8 oath.

9 THE PROSPECTIVE JUROR: Yes.

10 THE COURT: Let me just ask you, in the time between
11 filling out the questionnaire and today, have you read or
12 heard or learned anything about this case?

13 THE PROSPECTIVE JUROR: No, sir.

14 THE COURT: Okay. Thank you.

15 I am just going to follow up on a few things that
16 are in your questionnaire.

17 THE PROSPECTIVE JUROR: Okay.

18 THE COURT: Now, you indicated you are currently not
19 employed, is that right?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: When you were employed, what kind of
22 work did you do?

23 THE PROSPECTIVE JUROR: I was a payroll manager for
24 a construction company.

25 THE COURT: How long did you do that?

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Prospective Juror #104

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1 THE PROSPECTIVE JUROR: About three years.

2 THE COURT: Okay. Were you laid off from that job?

3 THE PROSPECTIVE JUROR: Yes.

4 THE COURT: Before that, what kind of work did you
5 do.

6 THE PROSPECTIVE JUROR: The same. I was in the
7 construction for a different company.

8 THE COURT: I see.

9 How long did you do that job?

10 THE PROSPECTIVE JUROR: About three-and-a-half
11 years.

12 THE COURT: I see.

13 That's been your career, as a payroll manager in the
14 construction industry?

15 THE PROSPECTIVE JUROR: That is correct, yes.

16 THE COURT: Okay.

17 Are you currently looking for work?

18 THE PROSPECTIVE JUROR: Yes.

19 THE COURT: Okay. I note that you served in 2006 on
20 a state jury trial. You say it was a criminal case involving
21 an accident, is that right?

22 THE PROSPECTIVE JUROR: That's correct.

23 THE COURT: Without telling me what the verdict
24 was -- don't tell me that -- did you deliberate with the jury
25 to a verdict?

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Prospective Juror #104

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: Okay.

3 Let me ask you a few things about your views on the
4 death penalty, if I may.

5 You indicate in your questionnaire the following
6 views on the death penalty.

7 Very harsh penalty but again it is on the juror's
8 decision to impose it.

9 And you also indicated, you were asked, please
10 explain why you hold those views.

11 You answered, on a very rational thinking.

12 You also indicated that your views on the death
13 penalty have evolved and that you were asked, please describe
14 your views on the death penalty for a person who has been
15 found guilty of intentional murder.

16 You say, favorable.

17 So could you expand on what you mean by that,
18 favorable?

19 THE PROSPECTIVE JUROR: Yes, sir.

20 When I said that my theory or my -- I evolved from
21 my previous thinking. Initially when I was going down my
22 ages, when I was young, I was thinking I was on a religious
23 background, you know, that death penalty is not favorable.
24 When I was young I was thinking on those terms. But over the
25 subsequent years, you know, I saw the world. I saw how crime

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Prospective Juror #104

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1 has developed and my views changed. That's why I said that my
2 views evolved from my original thinking. It evolved to
3 different level.

4 THE COURT: All right. Let me discuss with you how
5 this case will be tried and then we can go further into that.
6 I would like to go a little further into your views.

7 THE PROSPECTIVE JUROR: Okay. Sure.

8 THE COURT: The first phase of the case is called
9 the guilt phase and in that phase the government will provide
10 evidence that it believes will prove that the defendant
11 committed the crimes charged. The crimes charged are the
12 intentional and deliberate murder of an individual, conspiracy
13 to commit the murder and a charge involving the use of
14 firearms in connection with the other two charges.

15 THE PROSPECTIVE JUROR: Okay.

16 THE COURT: The government has the burden of proving
17 to the jury beyond a reasonable doubt that the defendant
18 committed each of those crimes.

19 THE PROSPECTIVE JUROR: Correct.

20 THE COURT: The defense has no obligation at all to
21 do anything in the trial because the law presumes the
22 defendant to be not guilty. Let's put it this way, to be
23 innocent of the crimes, and that, therefore, the defense
24 doesn't have to put on any case. The d defendant does not
25 have to testify and you can't hold it against the defendant

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Prospective Juror #104

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1 that he didn't testify or that no defense case was put on.

2 The burden is always on the government to prove the
3 crimes beyond a reasonable doubt to the jury unanimously.

4 THE PROSPECTIVE JUROR: Okay.

5 THE COURT: Do you understand that?

6 THE PROSPECTIVE JUROR: I understood.

7 THE COURT: Assuming that the jury returns a verdict
8 of guilty on the intentional murder charge, then there will be
9 a second phase of the trial. If the defendant is found guilty
10 of the intentional murder, the law permits one of two
11 sentences to be imposed. The basic sentence is life in prison
12 without the possibility of release, but the jury may also
13 impose a sentence, a greater sentence, of the death penalty.

14 In order for the jury to decide what the appropriate
15 sentence is, the government must provide evidence of certain
16 aggravating factors that it believes will convince the jury
17 that the defendant should not receive the sentence of life
18 without the possibility of release, but that the more
19 appropriate sentence is the greater punishment, which is the
20 death penalty.

21 THE PROSPECTIVE JUROR: Okay.

22 THE COURT: The defense has the right to provide
23 what are called mitigating factors, information about the
24 defendant's background, characteristics, record,
25 circumstances, that it believes demonstrate that the

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Prospective Juror #104

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1 appropriate sentence is life in prison and not the death
2 penalty.

3 THE PROSPECTIVE JUROR: Okay.

4 THE COURT: The jury is required to consider
5 everything and decide what weight it wishes to give, if any,
6 to these various factors in reaching a verdict on the penalty.

7 THE PROSPECTIVE JUROR: Okay.

8 THE COURT: The jury is never obligated to impose
9 the death penalty. The juror must decide individually what
10 his or her decision is. If eleven of the jurors decide that
11 they vote for the death penalty and one juror votes for life,
12 then the sentence is life. There must be a unanimous verdict
13 to impose the death penalty.

14 So you understand all of that?

15 THE PROSPECTIVE JUROR: I understood, yes.

16 THE COURT: If the defendant is found guilty of
17 intentional and deliberate murder at the guilt phase, and the
18 jury then hears the evidence of the aggravators and the
19 mitigators at the penalty phase, at the end of the penalty
20 phase could you impose a penalty of life in prison without the
21 possibility of release after hearing and considering all the
22 factors?

23 THE PROSPECTIVE JUROR: Yes.

24 THE COURT: Could you impose the death penalty after
25 hearing and considering all the factors?

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Prospective Juror #104

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: What would be important for you to know
3 about the defendant's background in order to impose the
4 greater penalty of the death penalty?

5 THE PROSPECTIVE JUROR: Depends upon the evidence,
6 like the circumstantial evidence, and also the -- I don't know
7 how to put it in court words.

8 THE COURT: Put it in your own words.

9 THE PROSPECTIVE JUROR: Okay. Mainly depends upon
10 the evidence that is presented by the government.

11 THE COURT: What about the evidence of mitigating
12 factors?

13 THE PROSPECTIVE JUROR: I will compare and see which
14 one is more stronger.

15 THE COURT: You understand, this is for a defendant
16 who has already been actually found guilty of the crime of
17 intentional murder of an individual.

18 THE PROSPECTIVE JUROR: Yes.

19 THE COURT: Are there any crimes for which the death
20 penalty would always be appropriate?

21 THE PROSPECTIVE JUROR: There are many. I mean, you
22 know.

23 THE COURT: Like what?

24 THE PROSPECTIVE JUROR: Like I can say a cult
25 leader, suppose he takes so many people on a mass suicide

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Prospective Juror #104

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1 mission, obviously that person is culpable for death penalty.

2 THE COURT: So someone who commits many murders?

3 THE PROSPECTIVE JUROR: In a way, yes.

4 THE COURT: Is that at the same time or over time?

5 THE PROSPECTIVE JUROR: Over time.

6 THE COURT: So they would not all have to be
7 committed at the same time?

8 THE PROSPECTIVE JUROR: Yes.

9 THE COURT: Would you always impose the death
10 penalty in that situation?

11 THE PROSPECTIVE JUROR: I will.

12 THE COURT: Are there any factors that you think are
13 important, so important, mitigating factors, that it is
14 unlikely you would impose the death penalty for someone who
15 committed an intentional and deliberate murder?

16 THE PROSPECTIVE JUROR: Again, like I said, it will
17 be again on the evidence that is produced by the government.

18 THE COURT: You seem to focus on the government's
19 evidence. You understand that even though the government is
20 obligated to provide evidence, the defense may also, but is
21 not obligated to provide evidence.

22 Do you understand that as well?

23 THE PROSPECTIVE JUROR: Yes, yes.

24 THE COURT: My question is that do you think you can
25 be fair and impartial in considering the defense's evidence of

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1 the mitigating factors?

2 THE PROSPECTIVE JUROR: Yes.

3 THE COURT: You were asked this question: Do you
4 believe that a defendant should first have to prove that he
5 does not deserve the death penalty before the jury should give
6 any consideration as to whether to impose a life sentence?

7 You said yes.

8 Is that your view, that you presume that the death
9 penalty is the appropriate penalty before considering if life
10 is an alternative?

11 THE PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: If I instruct you that that is not the
13 law and the law is that the presumptive penalty, we presume
14 that the penalty for this crime will be life in prison without
15 the possibility of release and it is only after considering
16 the aggravators and the mitigators, if you believe that those
17 aggravators are so significant that the death penalty is then
18 appropriate, you could then impose the death penalty. Would
19 you follow the law as I give it to you and base your analysis
20 on that formula?

21 THE PROSPECTIVE JUROR: Yes, I can.

22 THE COURT: All right. Does anyone want a side bar?

23 MR. JASPER: Yes, Your Honor.

24 THE COURT: Okay. Side bar.

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1 (Side bar.)

2 MR. JASPER: Judge, what I think we have here is a
3 serious burden shifting problem. I know that you asked him
4 about that in the last round. One of the things that he said
5 is that he would -- before you got to that 106 question, he
6 said he would listen to both side and see which was stronger.
7 I think he needs to be -- the point needs to be driven home is
8 that the defendant starts with being entitled to live. So he
9 starts with that.

10 And that the government has to prove beyond a
11 reasonable doubt that he deserves to die, and if he has a
12 problem with that, or ask him why -- maybe not this juror, but
13 why the jurors believe the presumption is one of death. What
14 is it that the death penalty makes them think the defendant
15 has to prove that he has to live? Because that -- the way he
16 said it is almost like if they start off even. We don't start
17 off even. We start off with the presumption of life.

18 THE COURT: All right. I understand the question.
19 What else?

20 MR. JASPER: He also on question 56 indicated
21 that -- 56 was hard to explain.

22 THE COURT: It was on La Cosa Nostra, The Godfather,
23 et cetera?

24 MS. MERKL: Whether the movies he's seen are
25 realistic. He doesn't remember what they are, the movies.

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1 MR. JASPER: The reason we think that's important,
2 Your Honor, is because this juror has indicated that the least
3 admirable people in his view are criminals, drug
4 addicts -- there is going to be evidence that some of the
5 members of organized crime here were addicted to
6 cocaine -- and gamblers, which is quite clearly going to be in
7 the case, and whether or not those either in combination or
8 individually along with the organized crime nature of the case
9 would make it difficult for him to be unbiased. Both phases,
10 either the guilt/innocent phase or the penalty phase.

11 He also seemed to indicate -- we would like you to
12 question him regarding 87. I am not sure what he means by his
13 answer to 87, give him a chance -- give her a chance to repent
14 and accept what he has done is wrong.

15 Judge, can I have --

16 THE COURT: Take your time. Do you want to consult?

17 MR. JASPER: Question 95, the --

18 THE COURT: We are off 87?

19 MR. JASPER: Forget 87. I apologize, Your Honor.

20 THE COURT: No problem.

21 MR. JASPER: 95, if called upon to decide between
22 the death penalty and life in prison without the possibility
23 of parole, would you consider the aggravating factors
24 presented in favor of the death penalty for a person convicted
25 of murder?

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1 Although the answer is yes, please explain is, if
2 the person is convicted, then yes.

3 So I am wondering whether or not he is just thinking
4 that the death penalty has to be applied upon the mere finding
5 of guilt at phase one.

6 THE COURT: I will follow up on that whole general
7 area.

8 Anything else?

9 MS. MERKL: Nothing from the government, Your Honor.

10 THE COURT: All right. Thank you.

11 (In open court.)

12 THE COURT: Have you seen a lot of movies about
13 organized crime?

14 THE PROSPECTIVE JUROR: A couple of them.

15 THE COURT: Do you think they are realistic?

16 THE PROSPECTIVE JUROR: I don't know.

17 THE COURT: Are they entertaining?

18 THE PROSPECTIVE JUROR: Surely, yes.

19 THE COURT: But you are not sure about whether they
20 are realistic?

21 THE PROSPECTIVE JUROR: Yes, I am not sure.

22 THE COURT: The fact that you watch these movies
23 involving, let's say, the mafia, is that like the Godfather?
24 You mentioned the Godfather in your questionnaire?

25 THE PROSPECTIVE JUROR: Yes.

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1 THE COURT: Do you think that your experience
2 watching these movies would have any effect on your ability to
3 be fair and impartial if there were evidence that the
4 defendant and some of his associates have been --

5 THE PROSPECTIVE JUROR: No, sir.

6 THE COURT: Let me finish the question, please.

7 -- that the defendant and some of his friends were
8 engaged in organized crime activities?

9 THE PROSPECTIVE JUROR: No, sir.

10 THE COURT: Now, in our discussion about the penalty
11 phase, what I said to you was that there is the presumption of
12 life. In other words, that if the defendant is found guilty
13 of intentional and deliberate murder and we go to a penalty
14 phase, the jury must presume that life in prison without the
15 possibility of release is a sufficient penalty for the crime.

16 Can you accept that as a presumption?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: The only way that the jury could reach a
19 death verdict would be if after hearing all the evidence of
20 the aggravating and mitigating factors the jury is convinced
21 that the defendant should not receive a sentence of life in
22 prison but should receive the more harsh sentence of the death
23 penalty.

24 THE PROSPECTIVE JUROR: Yes.

25 THE COURT: Could you follow that philosophical and

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1 legal presumption of life?

2 THE PROSPECTIVE JUROR: Yes. I will see it in a
3 philosophical way.

4 THE COURT: It is also in a legal way. In other
5 words, I would instruct you at the penalty phase that the law
6 is that there is a presumption that the defendant should
7 receive a life sentence and that you would then have to decide
8 whether the government has met its burden of proof beyond a
9 reasonable doubt that the death sentence is the only
10 appropriate sentence.

11 THE PROSPECTIVE JUROR: Yes. I will do it the legal
12 way too.

13 THE COURT: You will follow the law as I have just
14 described it?

15 THE PROSPECTIVE JUROR: Yes.

16 THE COURT: If eleven of the jurors vote for the
17 death penalty but you, after you make your individual
18 assessment and you hear the views of the other jurors, you
19 think that a sentence of life in prison without the
20 possibility of release is the appropriate sentence, what would
21 you do?

22 THE PROSPECTIVE JUROR: I will stand by my views.

23 THE COURT: Anything else?

24 MR. JASPER: May I have a moment, Your Honor?

25 THE COURT: Sure.

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1 (Pause.)

2 MR. JASPER: Your Honor, just a couple.

3 (Side bar.)

4 THE COURT: Yes, sir?

5 MR. JASPER: Judge, if you would ask him about the
6 least admired, I had asked you, I don't think you asked about
7 the least admired people being criminals, gamblers and drug
8 addicts or gambling and criminals, what he meant by that.
9 Gambling is a big part of this. The loansharking, the
10 bookmaking, the sports betting, if that would have an impact
11 upon him.

12 THE COURT: In more context.

13 MR. JASPER: If it would affect him, his ability to
14 sit fairly, in phase one.

15 THE COURT: It is a fairness question?

16 MR. JASPER: Yes.

17 MR. GOLTZER: It has to do with the guilt phase.

18 THE COURT: I understand.

19 MR. GOLTZER: The standard is lower.

20 THE COURT: I understand.

21 MR. JASPER: The other thing what I was trying to
22 formulate before, on 87, he indicated that the death
23 penalty --

24 THE COURT: I thought --

25 MR. JASPER: You know, I --

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1 MR. GOLTZER: You withdrew that.

2 THE COURT: You withdrew.

3 Do you want to reinstate it?

4 MR. JASPER: Your Honor, if I could just have one
5 second?

6 THE COURT: Sure.

7 MR. JASPER: A lot of information coming at me at
8 the same time here.

9 (Pause.)

10 MR. GOLTZER: Number 87 seems to indicate yes, that
11 death penalty is appropriate in any intentional murder. We
12 think it's a mistake, but we would like to clarify it.

13 MS. MERKL: He gave a contradictory answer in 87,
14 Your Honor.

15 THE COURT: Let me deal with it.

16 MR. JASPER: The other thing is the media question,
17 I don't think you asked him if there was anything about the
18 media, the media question.

19 THE COURT: I asked him about the Godfather and the
20 movie. I thought the movie question covered it.

21 MR. JASPER: Just in --

22 THE COURT: What's the media question?

23 MR. JASPER: Newspapers, read anything recently?

24 THE COURT: I didn't ask that question at the
25 beginning?

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1 MR. GOLTZER: I don't think so.

2 MR. JASPER: No.

3 THE LAW CLERK: I thought you did. We can check.

4 THE COURT: Check.

5 (Record read.)

6 MR. JASPER: Sorry, Judge.

7 THE COURT: Always good, belts and suspenders.

8 (In open court.)

9 THE COURT: Just a few more questions, sir.

10 Thank you for your patience.

11 Let's put it this way, there will be evidence
12 presented at the guilt phase that the government believes
13 proves that the defendant is guilty beyond a reasonable doubt.
14 You'll have to consider that evidence. Some of the evidence
15 may include evidence of the defendant's involvement in or
16 association with activities of gambling and narcotics.

17 Do you think that you can be fair and impartial on
18 the question of whether the government has proven that the
19 defendant is guilty of intentional murder knowing that there
20 is evidence that the defendant had involvement in those
21 activities?

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: Is there anything about involvement in
24 those activities that would preclude you from being fair and
25 impartial on the question which you must answer, which is

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Prospective Juror #104

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1 whether the defendant is guilty beyond a reasonable doubt of
2 the crimes charged?

3 THE PROSPECTIVE JUROR: No.

4 THE COURT: Now, let me just resolve something here.

5 You were asked the following question about your
6 views on the death penalty.

7 The question was: In your opinion, is the death
8 penalty the only appropriate sentence for a defendant who has
9 been proven guilty beyond a reasonable doubt of deliberately
10 and intentionally killing another person if, as here, the
11 alternative sentence is life in prison without the possibility
12 of release?

13 You answered yes. Then you said, give him her a
14 chance to repent and accept what he has done is wrong.

15 Was that a mistake where you said yes, the death
16 penalty is the only appropriate sentence?

17 THE PROSPECTIVE JUROR: I'm sorry. I didn't hear
18 you, sir. Can you repeat that question, please?

19 THE COURT: Sure.

20 The question was whether in your opinion the death
21 sentence is the only appropriate sentence for a defendant who
22 has been proven guilty beyond a reasonable doubt of a
23 deliberate and intentional killing of another person.

24 You said yes, that's the only appropriate sentence
25 if the alternative is life in prison.

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Prospective Juror #104

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1 Is that your view?

2 THE PROSPECTIVE JUROR: Yes.

3 That's -- I mean, if he is -- death sentence is the
4 only alternative to life imprisonment, then obviously it has
5 to be a yes.

6 THE COURT: So you would always vote for the death
7 penalty?

8 THE PROSPECTIVE JUROR: No. Again, I said before,
9 depends upon the evidence.

10 THE COURT: I think we are having a communication
11 issue here.

12 You are being asked where someone is found guilty of
13 an intentional murder and the choices are the death penalty
14 and life in prison without the possibility of release, would
15 you always impose the death penalty for intentional murder?

16 THE PROSPECTIVE JUROR: Again, I said, depends. Now
17 the next sentence that I wrote over there is?

18 THE COURT: Give him/her a chance to repent.

19 THE PROSPECTIVE JUROR: Yes.

20 THE COURT: And accept what he has done is wrong.

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: What does that mean?

23 THE PROSPECTIVE JUROR: I mean, it can be both ways.

24 We can give him -- according to me, I can give him, not me, I
25 can vote for death penalty, but at the same time I can also

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1 impose the imprisonment for life. I am go 50/50 way. That's
2 what I meant it over there.

3 THE COURT: 50/50, meaning you could do one or the
4 other?

5 THE PROSPECTIVE JUROR: Yes.

6 THE COURT: What would it depend on?

7 THE PROSPECTIVE JUROR: Again, the evidence. If --
8 if I feel that the evidence is correct, then I can go -- I
9 will vote for the death penalty also.

10 THE COURT: You've already found the person guilty
11 of murder.

12 THE PROSPECTIVE JUROR: Okay.

13 THE COURT: The evidence that you must consider is
14 what I have told you before about, the aggravating and
15 mitigating factors involving the background of the defendant,
16 other activities of the defendant, other circumstances that
17 will be brought to your attention at a penalty phase.

18 Will you be able to consider those factors, and
19 assuming that the penalty is life without the possibility of
20 release, but that if you think that the government has proven
21 at the penalty phase that the death penalty is justified, you
22 could then impose the death penalty if it is found beyond a
23 reasonable doubt by you and the entire jury that the death
24 penalty is the more appropriate penalty.

25 THE PROSPECTIVE JUROR: Yes. Then I will vote for

Prospective Juror #104

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1 the death penalty.

2 THE COURT: But there is a presumption that the
3 penalty of life in prison without the possibility of release
4 is a sufficient penalty.

5 Do you accept that.

6 THE PROSPECTIVE JUROR: I will accept that too.

7 THE COURT: Anything else?

8 MR. GOLTZER: One more question, Judge.

9 (Side bar.)

10 THE COURT: Yes?

11 MR. GOLTZER: My sense is there is a language
12 problem. The one question that may resolve it is, if you find
13 that the evidence is correct in terms of having proved the
14 intentional unjustified murder, would you then always impose
15 the death penalty. That's the one question I think he should
16 be asked.

17 MS. MERKL: I don't think there is a language issue.
18 This juror has answer -- his answers in the questionnaire are
19 nuanced. He seems to be following the Court's question. I
20 think the question in the questionnaire is very long and it
21 has some clauses. It is hard to understand when they are read
22 orally.

23 MR. GOLTZER: He may still be in the guilt phase
24 even though there has been extensive questioning. My sense is
25 that when he says if the evidence is correct he means the

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Prospective Juror #104

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1 evidence at the guilt phase.

2 (In open court.)

3 THE COURT: One more question. I apologize.

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: If the jury finds the defendant guilty
6 of intentional unjustified murder at the guilt phase and now
7 we are in the penalty phase and you receive evidence about the
8 aggravating factors and mitigating factors, you believe that
9 because the defendant was found guilty of the murder in the
10 guilt phase that you must impose the death penalty in the
11 penalty phase?

12 THE PROSPECTIVE JUROR: Yes.

13 THE COURT: All the time?

14 THE PROSPECTIVE JUROR: Yes.

15 THE COURT: You would not take into account the
16 mitigating factors that are presented?

17 THE PROSPECTIVE JUROR: Taking into all the factors,
18 I will say yes.

19 THE COURT: You would always impose the death
20 penalty?

21 THE PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: Why is that?

23 THE PROSPECTIVE JUROR: Like I told, my thoughts
24 have evolved. My opinions have evolved. People should be
25 more strict. They should consider the value of other people's

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Prospective Juror #104

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1 lives too.

2 I am not saying it's an eye for an eye or a tit for
3 a tat. We should make this understand to the -- to the public
4 that this is wrong and what you did to somebody else applies
5 to you also.

6 THE COURT: So you would never impose the penalty of
7 life in prison in that situation?

8 THE PROSPECTIVE JUROR: In that particular
9 situation, no.

10 THE COURT: All right. Thank you very much. Have a
11 nice day. Mr. Reccoppa will tell you what to do next.

12 THE PROSPECTIVE JUROR: Thank you, sir.

13 THE COURT: You are most welcome.

14 (Juror leaves courtroom.)

15 MR. GOLTZER: Motion to strike for cause, judge.

16 THE COURT: Any objection?

17 MS. MERKL: No.

18 THE COURT: All right. Number 104 is stricken for
19 cause.

20 105. Let's bring him in.

21 (Continued on next page.)

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Prospective Juror 105

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1 THE COURT: Bring in 105.

2 (Prospective juror present.)

3 THE COURT: Please be seated, sir, that first chair.

4 Good afternoon, sir.

5 THE PROSPECTIVE JUROR: Good afternoon.

6 THE COURT: Please be seated everyone.

7 You are Juror No. 105?

8 THE PROSPECTIVE JUROR: Yes, sir.

9 THE COURT: Thank you for your patience.

10 THE PROSPECTIVE JUROR: Thank you.

11 THE COURT: I remind you that you are still under
12 oath. And let me ask you, between the time you filled out the
13 questionnaire and today, have you read or learned or heard or
14 observed anything about this case anywhere?

15 THE PROSPECTIVE JUROR: Not really, just briefly on
16 the newspaper. But I didn't really -- I just glanced at it.

17 THE COURT: You didn't read the story?

18 THE PROSPECTIVE JUROR: No.

19 THE COURT: So you don't know anything more than you
20 knew before?

21 THE PROSPECTIVE JUROR: About ties.

22 THE COURT: All right. Thank you very much for not
23 reading the story. Continue to follow my instruction.

24 Let me ask you, you indicated that you own a
25 business for the last three years. Without telling me what

Prospective Juror 105

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1 the business is, what kind of a business is it?

2 THE PROSPECTIVE JUROR: Transportation industry.

3 THE COURT: Transportation?

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: Do you have employees?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: How many?

8 THE PROSPECTIVE JUROR: Small company, five.

9 THE COURT: If you were on a trial for 4 to 6 weeks,
10 would that create a financial hardship for you?

11 THE PROSPECTIVE JUROR: It would create a management
12 issue. But, you know --

13 THE COURT: You could handle it?

14 THE PROSPECTIVE JUROR: I wouldn't want to, but if I
15 have to it would be done.

16 THE COURT: All right. Let me just mention again,
17 as I did before, that when we have the trial it will be four
18 days a week not five days a week, so at least one day a week
19 there will be no trial.

20 THE PROSPECTIVE JUROR: Right. I recognize that.

21 THE COURT: Now, let me ask you about your answer to
22 the following question: Have you formed an opinion as to the
23 defendant based on anything you have seen or heard or read?
24 You answered yes. You said, Seems he was accused of being in
25 the mob.

Prospective Juror 105

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: Now, your job as a juror is to listen to
3 the evidence about guilt or nonguilt in the first phase of the
4 trial.

5 The government has the obligation of proving to you
6 beyond a reasonable doubt that the defendant is guilty of the
7 charges that have been brought, intentional murder of an
8 individual, conspiracy to murder and a weapons charge
9 associated with the other two charges.

10 The defense never has the obligation of proving
11 anything because the defendant is presumed to be innocent of
12 all charges and that presumption is carried with him
13 throughout the first phase of the trial until you deliberate
14 and you decide whether the government has met its burden.

15 Okay? Do you understand that.

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: Now, would the fact that the defendant
18 is accused of being in the mob, if that's what it is, would
19 that make it impossible for you to consider the evidence
20 presented here in court and decide fairly and impartially
21 whether the defendant committed these crimes?

22 THE PROSPECTIVE JUROR: It is not about me making a
23 decision. It was just an impression. So I don't think that
24 impression would necessarily have to do anything with any
25 decision. I was just saying I have a visual impression and it

Prospective Juror 105

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1 in no way would affect my, my decision ability.

2 THE COURT: So you would put any thoughts of that
3 aside; is that right?

4 THE PROSPECTIVE JUROR: Yeah. I don't think that
5 would be fair to anybody.

6 THE COURT: You indicated that your grandmother was
7 murdered. What were the circumstances?

8 THE PROSPECTIVE JUROR: She was killed by, by the
9 people that worked at her house.

10 THE COURT: In other words, she had people working
11 for her?

12 THE PROSPECTIVE JUROR: Yes.

13 THE COURT: And these were people who --

14 THE PROSPECTIVE JUROR: First the people was the
15 gardener and -- the gardener and like the --

16 THE COURT: The cook, handyman --

17 THE PROSPECTIVE JUROR: The person that helped out
18 in the house, cleaned.

19 THE COURT: So it was a man and a woman?

20 THE PROSPECTIVE JUROR: Two men.

21 THE COURT: Were these people ever prosecuted for
22 this crime?

23 THE PROSPECTIVE JUROR: They were prosecuted. They
24 were convicted.

25 THE COURT: In your view, was the case properly

Prospective Juror 105

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1 handled by the criminal justice system?

2 THE PROSPECTIVE JUROR: Yes.

3 THE COURT: You indicated that you spent time in
4 Greenpoint, Brooklyn and there is crime in Greenpoint?

5 THE PROSPECTIVE JUROR: Yeah. That question was
6 whether I knew the area and whether I've heard of any -- any
7 kind of organized crime and I did hear that there was sizable
8 drug trafficking in the area at the time.

9 THE COURT: You have no personal --

10 THE PROSPECTIVE JUROR: I didn't have any personal
11 experience with it.

12 THE COURT: You indicated the following answer to
13 the following question: Do you have any bias, sympathy or
14 prejudice with reference to the United States government that
15 would make it difficult for you to render a fair and impartial
16 judgment based solely on the evidence presented at trial? You
17 checked off yes. You explained as follows: I believe that if
18 the U.S. government gets involved there is some reason.

19 What do you mean by that?

20 THE PROSPECTIVE JUROR: When you read it back now it
21 sounds a little harsh, but I think what I meant was that the
22 involvement of federal agents in the operation of a sizable
23 size, I think it would mean that there was -- there was --
24 that this might be reasons whether or not they would want --
25 you know, I'm not really sure what I meant by that, you know.

Prospective Juror 105

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1 THE COURT: Well, you'll be instructed by the court
2 that both sides are equal before the court and that you're not
3 to give any special consideration or favor to the government
4 in connection with this case.

5 So it means that you must decide the case based on
6 the evidence itself, and the government has the obligation to
7 prove to you beyond a reasonable doubt based on the evidence
8 presented at the trial that the defendant is guilty.

9 Can you follow that instruction?

10 THE PROSPECTIVE JUROR: Yes.

11 THE COURT: If the defendant is found guilty by the
12 jury of intentional and deliberate murder, then and only then
13 will there be a penalty phase in the case with the same jury.
14 You understand that?

15 THE PROSPECTIVE JUROR: Yes. I didn't know that.

16 THE COURT: Well, there is no reason you should have
17 know it, but I need to explain the structure of the trial.

18 At the penalty phase there are only two possible
19 penalties. The presumptive penalty is life without the
20 possibility of release then the government will provide
21 evidence at the penalty phase of certain what they call
22 aggravating factors that the government believes that will
23 prove to the jury beyond a reasonable doubt that the penalty
24 of life in prison without the possibility of release is
25 inadequate to meet the objectives of justice and that the jury

Prospective Juror 105

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1 should impose the more significant penalty of the death
2 penalty.

3 The defense may offer mitigating factors that offset
4 the aggravating factors, but it's not required to, and the
5 jury will then weigh the factors, consider the evidence and
6 decide whether the government has met its burden of proof that
7 would cause the jury to impose the death penalty.

8 Do you understand that?

9 THE PROSPECTIVE JUROR: Yes.

10 THE COURT: No person on the jury is ever required
11 to vote for the death penalty. You understand that?

12 THE PROSPECTIVE JUROR: Yes.

13 THE COURT: If even one juror decides that the
14 proper penalty is indeed life in prison without the
15 possibility of release then that will be the penalty. It
16 would be necessary for all 12 jurors to agree that the death
17 penalty is appropriate.

18 You understand that.

19 THE PROSPECTIVE JUROR: Yes.

20 THE COURT: Now, let me read your comments about the
21 death penalty and then we'll discuss it further.

22 You were asked for your views on the death penalty
23 and you say, I don't personally agree with the death penalty
24 because there are instances of people being wrongly convicted.
25 I believe that there are people that have been wrongly

Prospective Juror 105

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1 convicted.

2 Is that your view?

3 THE PROSPECTIVE JUROR: Yes.

4 THE COURT: My question is, if the jury returns a
5 verdict of guilty on intentional and deliberate murder and
6 there is a penalty phase, and there is evidence presented of
7 aggravating factors, mitigating factors, when it comes to the
8 point where you have to deliberate and decide what the penalty
9 should be, could you impose a penalty of death in that
10 circumstance?

11 THE PROSPECTIVE JUROR: I -- am I instructed to
12 not -- I mean, my question is, are we looking at using the
13 death penalty or are we just saying, okay, that's going --
14 my -- you know, I'm not really -- I have a hard time going
15 through that motion personally.

16 I think it's a big -- I'm not sure how I would act,
17 I think. I think if -- if I was instructed to proceed with
18 something that I obviously -- the evidence was clear, I'm not
19 really sure, your Honor.

20 THE COURT: All right. Let's take it one step at a
21 time. I know this is very difficult, it's not something you
22 think about every day in your life.

23 We appreciate that you're giving it this much
24 thought and also there is no right or wrong answer here so
25 whatever you think that's what we want to know. Okay?

Prospective Juror 105

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: Okay. Are there any circumstances of an
3 intentional and deliberate murder or the background of a
4 defendant that would make you inclined to impose the death
5 penalty?

6 THE PROSPECTIVE JUROR: Your Honor, I'm a very
7 talkative person and I have an opinion about everything and --
8 you know, this is something that I -- I don't think I've ever
9 thought of being in this position and I think it's a -- it's a
10 little overwhelming, to be honest with you. You know --

11 THE COURT: Is this an issue that creates some sort
12 of an emotional problem for you?

13 THE PROSPECTIVE JUROR: Well, just by --

14 THE COURT: I don't mean that in a negative way.
15 Does it affect you in some way emotionally?

16 THE PROSPECTIVE JUROR: Well, just by the way I'm
17 feeling right now, it obviously does.

18 THE COURT: Tell me how you're feeling right now.

19 THE PROSPECTIVE JUROR: I feel the same way when you
20 first mentioned it the first day that I saw you, I felt my
21 stomach drop, and I felt, you know, literally, you know, sick
22 to my stomach.

23 I'm very nervous right now just speaking about it.
24 I think it's a great burden, but you know, if -- you know,
25 seeing that the process has to go that way and if -- you know,

Prospective Juror 105

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1 if the rule is given to the jury at the time would be that,
2 with that kind of evidence then it would show that he -- that
3 the defendant -- that he does deserve the death penalty, then
4 I think I -- I would probably agree with the decision. It
5 would not be an easy decision. I think it would -- all right.

6 THE COURT: In what kind of case involving what
7 circumstances of a murder that is an intentional and
8 deliberate murder would you impose the death penalty, what
9 kind of a case, if you can think of a kind of case?

10 THE PROSPECTIVE JUROR: Well, just to give my
11 personal experience. I didn't wish the death penalty on the
12 two men that killed my grandmother. They got killed in jail
13 in different circumstances, but at the time of the prosecution
14 like I wasn't screaming for blood. You know, so I think --

15 THE COURT: Do you still feel the same way about it
16 as you felt then?

17 THE PROSPECTIVE JUROR: The way I felt then, I
18 didn't have -- I didn't feel like there was a cloud over me to
19 put these people away. I mean, I think I wrote in my notes
20 there that I -- I don't think that there's any kind of
21 retribution that I could get, we as a family could get, so
22 there was no -- I wasn't going to get anything from it.

23 THE COURT: Any other questions?

24 MR. JASPER: No, your Honor.

25 MS. MERKL: No, your Honor.

Prospective Juror 105

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1 THE COURT: We want to thank you for coming in, sir,
2 and for your thoughts, which we appreciate.

3 Mr. Reccoppa will tell you what to do next. You
4 have a good day.

5 THE PROSPECTIVE JUROR: Thank you.

6 THE COURT: You're most welcome.

7 (Prospective juror leaves.)

8 MS. MERKL: Your Honor, the government would move to
9 dismiss this juror for cause. He's clearly emotional and in
10 his own words sick to his stomach regarding the very prospect
11 of being here.

12 He stated that he would have a hard time, that he
13 was not really sure he could make the decision. He indicated
14 that he was extremely uncomfortable about the whole situation
15 and even in a situation of somebody killing a close family
16 member he indicated that he was unwilling to impose the death
17 penalty.

18 Given the totality of his answers in the
19 questionnaire combined with his demeanor the government
20 believes this juror is substantially impaired.

21 MR. JASPER: I disagree with that view. What he
22 said was his stomach dropped when he heard the death penalty
23 was on the table. I don't think he said that he was sick to
24 his stomach, but I won't argue with that.

25 Your stomach is supposed to drop. This is a serious

Prospective Juror 105

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1 thing and he reflected that. And he also indicated that he
2 would be able to impose it again, reluctantly, yes, but taking
3 a person's life -- anytime the government, the state takes a
4 person's life, we want people who take that seriously.

5 The only question is, would it be blocked, would it
6 be an obstacle, and I don't think it was from this juror's
7 comments. It's an emotional situation for all jurors.

8 That's what the different studies have told us in
9 the post-verdict interviews in capital cases. So I would say
10 if that's the government's main objection and from what
11 they've said here, I think that is rebutted by this juror's
12 demeanor in answer to very thoughtful answers to your Honor's
13 questions.

14 MS. MERKL: He did say that he was sick to his
15 stomach. He also stated he was very nervous.

16 I would note in regards to demeanor, the juror was
17 extremely gravely trying to assert that he could if instructed
18 by the court follow the rule, but he was very clear that he is
19 obstructed in his ability to fairly and impartially evaluate
20 the imposition of the death penalty.

21 The government feels that he is totally unqualified.
22 That is based not just on his responses while being questioned
23 by also in response in the questionnaire he stated repeatedly
24 that he feels that the worst punishment is imprisonment for
25 life.

Prospective Juror 105

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1 He thinks the death penalty should be -- he's
2 opposed to it with very few exceptions. He stated that he
3 thinks life in prison is the worst punishment.

4 There are some follow-up questions that could
5 potentially be appropriate with regard to penalty inversion.

6 THE COURT: The penalty inversion question I never
7 got to. It was on my list. I'd like to ask him that
8 question. Let me ask him that.

9 MS. MERKL: In addition, if you are going to bring
10 him back, the government apologizes, we had a typographical
11 error in our letter.

12 The questions indicated for Juror 106 were in fact
13 for Juror 105 as Juror number 106 was excused. The juror
14 himself has a little bit of a criminal record, as indicated in
15 question 46.

16 So if your Honor is inclined to question him
17 further, we would inquire about that. We would also ask, your
18 Honor, if this juror could vote to impose the death penalty
19 against this defendant in a case involving a single deliberate
20 murder.

21 MR. JASPER: Your Honor, I'm not sure if I heard
22 that last proposed question right. It sounds like a stakeout
23 question, but it exactly shows that when we get in the real
24 time of the courtroom questions sometimes get case specific,
25 and I just wanted the court to be aware of what that last

Prospective Juror 105

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1 question sought to do.

2 MS. MERKL: It's by no means a stakeout question.
3 It's the issue in the case, whether this juror could vote for
4 the death penalty. That is not a stakeout question in the
5 slightest. Based on his prior answers, it's the issue in the
6 case, but based on his prior answers there is a very, very
7 clear reluctance on his part.

8 MR. JASPER: The government said for this particular
9 defendant. I don't know that he said that he had any problem
10 with a single sole murder case. I don't think that that was
11 put to him. I could be wrong, but --

12 THE COURT: But he said that he didn't support the
13 death penalty for the murder of his grandparents.

14 MS. MERKL: Grandmother.

15 THE COURT: Grandmother.

16 MR. JASPER: He did say that. You want to ask him
17 that question I have no problem with that question. I just
18 wanted to indicate that --

19 THE COURT: Well, no. It may be that the question
20 should not be whether for this particular defendant, but for a
21 single intentional deliberate murder, which is what is charged
22 in this case.

23 MR. JASPER: Your Honor, it's the similar, I think,
24 back and forth, legitimate back and forth that we go through.
25 If you're asking that, then he should be asked the aggravator

Prospective Juror 105

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1 that the defendant is already serving a life sentence for a
2 separate murder as well.

3 MS. MERKL: Your Honor, the --

4 MR. JASPER: That is ruled that it's coming in. The
5 previously convicted of an offense involving a firearm in 2008
6 conviction is in. It's a statutory aggravator. So they would
7 have to reach that in order to get to the selection process.

8 MS. MERKL: With all due respect, the juror has
9 already been asked those questions in the questionnaire.

10 THE COURT: Bring him in.

11 MR. JASPER: I think what this --

12 THE COURT: I'm bringing him in.

13 (Prospective juror present.)

14 THE COURT: I just have a couple more questions, if
15 I may.

16 The law states that the penalty of life in prison
17 without the possibility of release is the lesser penalty and
18 the death penalty is the greater penalty.

19 Do you accept that rule of law and would you in your
20 deliberations in a penalty phase, would you follow that rule
21 of law?

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: If during a penalty phase for someone
24 who has been convicted by the jury of an intentional and
25 deliberate murder, let's say you learned that the defendant

Prospective Juror 105

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1 had also been convicted of another murder and was serving a
2 life sentence without possibility of release for that murder,
3 would that have any bearing on your consideration of what
4 penalty to impose?

5 That is just one potential factor. I'm just giving
6 you a for instance. There may be other factors, aggravators
7 and mitigators, but I'm just mentioning that factor and asking
8 how that might affect your thinking.

9 THE PROSPECTIVE JUROR: Would this issue be brought
10 up by the judge and told --

11 THE COURT: No. The factors, the aggravating
12 factors -- and this might be one of them hypothetically --
13 would be brought up by the government and evidence would be
14 provided by the government. There might be mitigating factors
15 brought up by the defense, although it's not required to bring
16 up any mitigation, the burden is always on the government --

17 THE PROSPECTIVE JUROR: Right.

18 THE COURT: -- to prove beyond a reasonable doubt
19 that, number one, life in prison is not sufficient to meet the
20 purposes of justice but that the death penalty is required in
21 order to achieve the purposes of justice in the case.

22 So, I go back to my question. If you're given
23 evidence of that nature at the penalty phase, would that have
24 any affect on your consideration of what the penalty should
25 be?

Prospective Juror 105

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: Why would that be?

3 THE PROSPECTIVE JUROR: I think -- I think it would
4 point to the fact that the defendant is clearly a -- maybe --
5 I don't know if the word is unrepairable -- this person is
6 beyond any human remorse.

7 THE COURT: If that's the case, if you reach that
8 conclusion, do you think that a sentence of death might be
9 appropriate?

10 THE PROSPECTIVE JUROR: Well, if there is to be a
11 scale of a really hard decision to make, I would probably make
12 it -- you know, a little more towards that. It would add
13 weight, it would definitely add weight of consideration to
14 that, it would add weight to that consideration. But it would
15 still be extremely difficult to make, I think.

16 THE COURT: Do you believe that there is any
17 circumstance in which you could vote for the death penalty for
18 someone who is convicted of the intentional and deliberate
19 murder of another individual?

20 THE PROSPECTIVE JUROR: I think if there is a death
21 penalty -- remembering those questions that were presented
22 before, you know, the options coming up more and more where
23 you wouldn't see someone more -- where the death penalty would
24 apply to, somebody that -- that was previously convicted, as
25 you said before, that there was premeditation --

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1 THE COURT: Well, the premeditation for the crime
2 that's charged in this case is the subject of the guilt phase
3 not the penalty phase. He's already been convicted of
4 intentionally and deliberately committing a murder in this
5 case, so premeditation is already resolved.

6 The issue is what the penalty should be based on the
7 evidence of the aggravators and the mitigators.

8 THE PROSPECTIVE JUROR: Okay. I was just stating to
9 the questionnaire that was given to me, I'm sorry. Yes, I
10 think if the person was -- I think that would -- that would --
11 weighing it in consideration of the death penalty.

12 THE COURT: You haven't answered my question, sir.
13 Do you believe that you could impose the death penalty under
14 any circumstances for someone convicted of a deliberate and
15 intentional murder? Can you answer the question?

16 I just want to know what you think. There is no
17 right or wrong answer. Don't worry about it. I just want to
18 know what you sincerely think in answer to that question,
19 that's all.

20 THE PROSPECTIVE JUROR: You know, I'm -- I
21 apologize.

22 THE COURT: Don't apologize.

23 THE PROSPECTIVE JUROR: It sounds easy to say --

24 THE COURT: It's not easy. None of this is easy. I
25 just want to know what your views are. There is no right

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1 answer or wrong answer, there is only your answer.

2 THE PROSPECTIVE JUROR: No. My answer is that
3 there's no -- I think from my -- there would -- I think I
4 would ultimately -- I would decide yes to a heinous crime and
5 that I would -- I think I would decide yes.

6 THE COURT: What's a heinous crime, in your view?

7 THE PROSPECTIVE JUROR: Well, obviously like
8 something what happened to my family member would be heinous,
9 I think. Cold murder, you know, murder of children, something
10 like that. I think that would --

11 THE COURT: So the murder of your grandmother is a
12 heinous crime?

13 THE PROSPECTIVE JUROR: Yes.

14 THE COURT: But you didn't support the death penalty
15 in that case?

16 THE PROSPECTIVE JUROR: It wasn't an option, first of
17 all. I just -- I wasn't -- what I was bringing up to the
18 court was that I wasn't screaming for, I didn't see a need for
19 it. Like, it wasn't going to satisfy me as -- you know.

20 THE COURT: I see. And so you believe you could
21 vote for the death penalty for the intentional deliberate
22 murder of an individual, is that what you're saying?

23 THE PROSPECTIVE JUROR: Yes. I think that if the
24 death penalty was available for the murder of my grandmother,
25 then I think I would have -- you know.

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1 THE COURT: You would have --

2 THE PROSPECTIVE JUROR: I would have accepted it.

3 THE COURT: You would have supported it or accepted
4 it?

5 THE PROSPECTIVE JUROR: I would have supported it,
6 yeah.

7 THE COURT: Let me go back to what you said about,
8 you know, the feeling in the pit of your stomach.

9 THE PROSPECTIVE JUROR: Yes.

10 THE COURT: Is there any reason why you think you
11 would not be able to serve as a juror based upon your feelings
12 about this case -- or about the type of case, rather?

13 THE PROSPECTIVE JUROR: Well, I don't think my
14 circumstances is different from any other juror. I think it's
15 a hard case to deal with so there's no question about that, so
16 I think anybody would be subject to the same things.

17 You know, would I be able to? I think I would, but
18 it's not something desirable, you know, I think, because of
19 the nature of the -- you know, it's a very hard thing to deal
20 with.

21 THE COURT: All right. I thank you very much. You
22 have a good day.

23 Mr. Reccoppa will tell you what to do next.

24 (Prospective juror leaves.)

25 MS. MERKL: Your Honor, the government will renew

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1 it's motion and ask for additional follow-up if the court is
2 inclined to reserve on this juror.

3 THE COURT: Anything else?

4 MR. JASPER: We oppose that, your Honor.

5 The key question you asked him was whether or not he
6 would be able to impose this on a single murder. He said yes.

7 You asked him also whether or not if the defendant
8 had been convicted or was serving life for another murder, he
9 said yes. This is a guy, most respectfully, who takes
10 seriously the role that he has here.

11 It's not an easy thing, we all know it. We said it
12 before, it's not supposed to be easy, Judge. What we saw here
13 through the very thorough examination was that he could do it,
14 he could do it, he could impose the death penalty. He could
15 pull the lever, but it wouldn't be an easy thing and I don't
16 think it's easy for any of these people.

17 If we had jurors who didn't reflect upon it we would
18 have a panel, a jury box full of killers, and that's not what
19 we want.

20 THE COURT: That's a very dramatic statement.

21 MR. JASPER: I apologize, your Honor.

22 THE COURT: That's all right. I said it was
23 dramatic, I didn't say it was inappropriate.

24 I understand the government's position. I asked the
25 juror directly whether he could impose the death penalty. His

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1 demeanor is that it's very troubling to him, very difficult
2 but in the end he said he could do so under some circumstances
3 and I think he's a thoughtful individual and that he is
4 definitely not substantially impaired.

5 The motion is denied.

6 MS. MERKL: Your Honor, in that event, the
7 government does have additional follow-up that the court
8 failed to ask with regard to his criminal history.

9 We also had a question regarding whether or not he's
10 going to hold the government to a higher burden of proof. He
11 himself served time in prison, your Honor, and we would like
12 to know more about that.

13 THE COURT: I'll ask him about the criminal history
14 just so we can close this out. I think that he indicated he
15 could follow the court's instructions as to what the law is on
16 penalty inversion. I think the same would be true for other
17 instructions that I would give.

18 (Prospective juror present.)

19 THE COURT: I forgot to ask you a question. I bet
20 you thought you were done. I'm glad you're smiling.

21 In your questionnaire you indicated that you had a
22 conviction for some sort of a marijuana offense?

23 THE PROSPECTIVE JUROR: Yes.

24 THE COURT: Can you tell us what that was.

25 THE PROSPECTIVE JUROR: Yeah. I was Upstate New

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1 York and I had purchased some marijuana from some friends and
2 I was bringing it back and we got stopped by the police.

3 THE COURT: All right. Now, you had purchased
4 marijuana for your personal use or to sell to other people?

5 THE PROSPECTIVE JUROR: Well, mixed. It was, you
6 know, to sell to my friends and stuff like that.

7 THE COURT: And was this an isolated instance or had
8 you done this before?

9 THE PROSPECTIVE JUROR: It probably was a blessing
10 in disguise because at the time I was -- I didn't have much
11 money so I was probably going to try to start doing it, you
12 know -- as you said, like on a more consistent basis. So that
13 put a stop to it.

14 THE COURT: How long ago was this?

15 THE PROSPECTIVE JUROR: This was '04.

16 THE COURT: What was the outcome of the case?

17 THE PROSPECTIVE JUROR: Well, they gave -- it was
18 originally a felony but then it got reduced to a misdemeanor.

19 THE COURT: Where was this, what county?

20 THE PROSPECTIVE JUROR: Jefferson County Upstate.

21 THE COURT: Way Upstate?

22 THE PROSPECTIVE JUROR: Yeah, yeah.

23 THE COURT: Up by Lake George?

24 THE PROSPECTIVE JUROR: Well, a little further. I
25 have friends up there.

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1 THE COURT: Lake Champlain?

2 And have you had any subsequent involvement in
3 purchasing marijuana?

4 THE PROSPECTIVE JUROR: No.

5 THE COURT: Do you think that your experience in
6 that situation would have any affect on your ability to be
7 fair and impartial in a situation where there may be evidence
8 of narcotics trafficking in this case?

9 THE PROSPECTIVE JUROR: No. I wasn't really in much
10 sense in the business to know much about it or to really get
11 any really -- real experience, you know.

12 THE COURT: Why did you go all the way upstate to do
13 this?

14 THE PROSPECTIVE JUROR: I have friends there and
15 that's when I kind of found out about, you know, people that
16 sell up there. So --

17 THE COURT: Since then?

18 THE PROSPECTIVE JUROR: No, well, I was in college at
19 the time. I came back, finished school and opened -- been in
20 business ever since.

21 THE COURT: What was the first business you opened?

22 THE PROSPECTIVE JUROR: I had -- I created a
23 computer business for a touch screen system for cars.

24 THE COURT: What kind of system?

25 THE PROSPECTIVE JUROR: Touch screen system for cars

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1 and then I was installing them in limousines, you know, other
2 kind of vehicles, show cars. But that -- when the financial
3 situation happened a couple of years ago, a couple of my
4 dealers went bankrupt and so did I.

5 THE COURT: Did you do this mainly for car dealers?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: You didn't do it for individuals?

8 THE PROSPECTIVE JUROR: I dealt with individuals, but
9 mostly car dealers.

10 THE COURT: How did you get your individual
11 customers?

12 THE PROSPECTIVE JUROR: They were -- I dealt with a
13 couple of custom shops that put car stereos and -- one did a
14 leather, you know, leather seats so then guys would go with a
15 nice car and put everything in it.

16 THE COURT: How did you hook up with these shops?

17 THE PROSPECTIVE JUROR: I just basically started
18 going shop to shop.

19 THE COURT: So you'd go and solicit them?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: You would do your own marketing; is that
22 right?

23 THE PROSPECTIVE JUROR: Yeah, it was just me and a
24 couple of guys, really, just --

25 THE COURT: Are they the same people you will were

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1 in Jefferson County with?

2 THE PROSPECTIVE JUROR: No, that was a whole
3 different life.

4 THE COURT: That was a different life?

5 THE PROSPECTIVE JUROR: Yep.

6 THE COURT: Okay. Thank you very much.

7 (Prospective juror leaves.)

8 THE COURT: Ms. Merkl, anything else?

9 MS. MERKL: Your Honor, the government feels that
10 this juror, although he calls it a different life, it was
11 frankly not that long ago that he seriously contemplated
12 becoming a drug dealer and became arrested.

13 In New York State for felony marijuana possession
14 there needs to be a lot of marijuana involved. The government
15 just has concerns about this juror's ability to respect the
16 law and participate in this process in light of the recency of
17 that conviction.

18 Certainly as far as turning his life around, he
19 seems to be to be doing a very good job about that, but we
20 have very serious concerns about this juror.

21 MR. GOLTZER: He pled to a misdemeanor which renders
22 him qualified for jury service. He has no felony conviction.
23 He said it was a mixed blessing. The fact that he may have
24 contemplated something is not applicable here..

25 MS. MERKL: He didn't just contemplate it, your

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1 Honor. He to Lake Champlain and purchased a huge quantity of
2 marijuana that he was planning to distribute.

3 MR. GOLTZER: There is no evidence that it was a
4 huge quantity of marijuana. You just needed a few ounces to
5 be guilty of a felony in New York at that time.

6 THE COURT: Not with marijuana?

7 MR. GOLTZER: Yes, eight ounces. We don't know how
8 much it was, but --

9 THE COURT: Should I bring him back and ask him how
10 much? I don't think that is the issue here.

11 MR. GOLTZER: Jefferson County is not exactly a
12 liberal part of the state. I don't minimize any criminality,
13 but it's a misdemeanor.

14 THE COURT: I don't want to go into the relative
15 penalties in different counties in this case.

16 MR. GOLTZER: I don't either, but --

17 THE COURT: He pled to a misdemeanor. That's what
18 the record is.

19 MR. GOLTZER: Right.

20 MS. MERKL: He served 30 days in jail. It's not
21 just a misdemeanor slap on the wrist ticket, your Honor.

22 THE COURT: Understood.

23 MR. GOLTZER: It's not a disqualification as a
24 matter of law.

25 THE COURT: I understand.

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1 MS. MERKL: I'm not suggesting that it is a
2 disqualification as a matter of law, Mr. Goltzer.

3 THE COURT: If I change my mind I'll let you know
4 but I've already ruled and I'm standing by my ruling.

5 Thank you. I will see you all at half past two.

6 (Luncheon recess.)
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1 A F T E R N O O N S E S S I O N

2 (The following occurred in the absence of the jury)

3 THE COURT: All set?

4 Okay. 107, please.

5 (Juror number 107 present.)

6 THE COURT: Please be seated.

7 Good afternoon.

8 THE PROSPECTIVE JUROR: Good afternoon.

9 THE COURT: You are juror number 107?

10 THE PROSPECTIVE JUROR: Correct.

11 THE COURT: I remind you that you are still under
12 oath.

13 THE PROSPECTIVE JUROR: Okay.

14 THE COURT: Let me ask you, between the time you
15 filled out the questionnaire and today, have you read, heard,
16 listened to or observed any information about the case
17 anywhere?

18 THE PROSPECTIVE JUROR: No.

19 THE COURT: Okay. You indicated on your
20 questionnaire that you have been a manager for 28 years with
21 the same organization, is that right?

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: Without telling me the name, don't tell
24 me the name, is it a company or is it a governmental agency or
25 not-for-profit? What kind of organization?

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1 THE PROSPECTIVE JUROR: Government.

2 THE COURT: Okay. Is it a law enforcement agency or
3 other?

4 THE PROSPECTIVE JUROR: Other.

5 THE COURT: Okay. When you say you are a manager,
6 before you were manager what kind of work did you do?

7 THE PROSPECTIVE JUROR: I was -- that would say
8 where I worked, if that's okay.

9 THE COURT: No, don't.

10 THE PROSPECTIVE JUROR: I was a worker.

11 THE COURT: All right. Is it a large organization?

12 THE PROSPECTIVE JUROR: Yes.

13 THE COURT: In New York City?

14 THE PROSPECTIVE JUROR: Throughout the United
15 States.

16 THE COURT: Okay. Then don't tell me.

17 THE PROSPECTIVE JUROR: Okay.

18 THE COURT: Is it federal, state or city?

19 THE PROSPECTIVE JUROR: Quasi federal, I guess.

20 THE COURT: Quasi federal.

21 Now, you indicated that you served as a grand juror
22 back in 1995. Is that right?

23 THE PROSPECTIVE JUROR: Correct.

24 THE COURT: You served in 1998 on a civil trial in
25 state court, is that right?

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: In that trial the jury reached a verdict
3 in a negligence case.

4 Let me just ask you this, did you deliberate with
5 the jury?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: All right. The jury reached a verdict.
8 Don't tell me what it was.

9 THE PROSPECTIVE JUROR: Correct.

10 THE COURT: In 2002, in the state civil trial
11 involving negligence, you were also on a jury?

12 THE PROSPECTIVE JUROR: Correct.

13 THE COURT: And the jury reached a verdict in that
14 case as well?

15 THE PROSPECTIVE JUROR: Correct.

16 THE COURT: Okay. Now, let me just ask you, the
17 distinction between a grand jury and a trial jury, do you
18 understand what that is?

19 THE PROSPECTIVE JUROR: Yes.

20 THE COURT: What is it?

21 THE PROSPECTIVE JUROR: The grand jury was to see if
22 people were going to get indicted, to see if it was going to
23 go to court; and the civil was for negligence or, you know,
24 what -- it wasn't necessarily something against the law.

25 THE COURT: All right. As opposed to a criminal

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1 case?

2 THE PROSPECTIVE JUROR: Correct.

3 THE COURT: Now you are being considered to be a
4 juror in a criminal trial in federal court. In this case, the
5 way it works is that, as in all other criminal cases, it is
6 the burden of the government to prove beyond a reasonable
7 doubt that the defendant has committed the crimes that he is
8 charged with. Right?

9 THE PROSPECTIVE JUROR: Correct.

10 THE COURT: This defendant is charged with three
11 crimes, the intentional deliberate murder of an individual;
12 conspiracy to commit the murder; and a weapons charge in
13 connection with the other two charges.

14 Do you understand that?

15 THE PROSPECTIVE JUROR: Yes.

16 THE COURT: Okay. But it is also a death penalty
17 trial. So if the jury -- oh, and the burden is always on the
18 government to prove beyond a reasonable doubt that the
19 defendant is guilty of the crimes.

20 Do you understand that?

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: The defendant doesn't have to prove
23 anything.

24 THE PROSPECTIVE JUROR: Correct.

25 THE COURT: The defendant is presumed to be innocent

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1 for all purposes unless and until the jury decides after
2 hearing all the evidence and deliberating that he is actually
3 guilty beyond a reasonable doubt.

4 Do you understand that?

5 THE PROSPECTIVE JUROR: Yes.

6 THE COURT: Okay. Should the defendant be found
7 guilty of the intentional and deliberate murder charge, then
8 and only then would the jury have to be reconvened for a
9 second trial, the same jury, to consider the appropriate
10 penalty.

11 There are only two penalties available to this
12 murder charge. The presumptive penalty is life without the
13 possibility of release, meaning generally that is the penalty
14 that is exacted for this crime.

15 But in this case the death penalty is also
16 available. So at a second phase of the trial, which we call
17 the penalty phase, the jury will be obliged to hear evidence
18 from the government about certain aggravating factors that the
19 government believes will demonstrate beyond a reasonable doubt
20 that the jury should not impose the lesser penalty of life
21 without the possibility of release but should impose the more
22 severe penalty of death.

23 The defense may offer evidence, what is called
24 mitigating evidence, which it believes would demonstrate to
25 the jury that the appropriate penalty is the lesser penalty,

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1 the life without the possibility of release penalty, and that
2 the government has not proven beyond a reasonable doubt that
3 it is necessary to impose the more severe penalty of death.

4 The jury will listen to all the evidence and then
5 will weigh the evidence, consider the evidence and make a
6 decision.

7 The only way that a death penalty can be imposed is
8 if all the jurors agree, all 12. If even one juror decides
9 that the death penalty is not appropriate but that life is the
10 proper penalty, then the penalty will be life in prison
11 without the possibility of release. Each individual juror is
12 obligated to decide for him or herself what the penalty should
13 be.

14 THE PROSPECTIVE JUROR: Okay.

15 THE COURT: But to discuss it with the other jurors
16 in an effort to reach a unanimous verdict if the jury can.
17 But if a juror has a strongly held view that life without
18 possibility of release is the appropriate penalty, jurors are
19 under no obligation to change his or her mind.

20 Do you understand that as well?

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: It is strictly a personal decision.

23 All right. Now let me go over some of the death
24 penalty questions and follow-up on them with you.

25 THE PROSPECTIVE JUROR: Okay.

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1 THE COURT: Now, in stating your views on the death
2 penalty, you said, I believe the death sentence is a case by
3 case decision. Each case is different. If someone cannot be
4 rehabilitated and continues killing.

5 Is that your general view about the death penalty?

6 THE PROSPECTIVE JUROR: Basically.

7 THE COURT: You also indicated as to whether you
8 were strongly in favor or strongly opposed, you circled the
9 six, which is right in the middle. You said you didn't know
10 how long you held this view of the death penalty. You also
11 said that the imposition of the death penalty for an
12 intentional murder depends on the circumstances.

13 Could you elucidate me on that?

14 THE PROSPECTIVE JUROR: I've never really been under
15 that -- you know, to make that decision and really never got
16 into it. But I don't believe -- I believe in some
17 circumstances, you know --

18 THE COURT: Are there certain types of cases where
19 you think the death penalty is more appropriate than others?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: Okay. Please share with us the types of
22 cases that you think are more appropriate for the imposition
23 of the death penalty than others.

24 THE PROSPECTIVE JUROR: Mass murders, intentional.

25 THE COURT: They are all intentional. This case

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1 involves an alleged intentional murder, so let's put aside
2 that issue --

3 THE PROSPECTIVE JUROR: Okay.

4 THE COURT: -- and talk about the kind of
5 intentional murder that you think should be potentially
6 subject to the death penalty.

7 THE PROSPECTIVE JUROR:

8 THE COURT: Mass murder, you said?

9 THE PROSPECTIVE JUROR: Yes.

10 Unable to be rehabilitated. I don't know.

11 THE COURT: What evidence would you look to
12 regarding the ability or inability to be rehabilitated? What
13 kind of evidence would you be interested in hearing?

14 THE PROSPECTIVE JUROR: The history, maybe why they
15 did it. I don't know.

16 THE COURT: Okay. History.

17 Would you be interested in other crimes that the
18 person had committed?

19 THE PROSPECTIVE JUROR: Yes, that too. That would
20 be a factor. I don't know.

21 THE COURT: If you received evidence at the penalty
22 phase that the defendant was already serving a life sentence
23 would you tell the possibility of release, for instance, in
24 connection with another homicide, would that have any
25 potential effect on your consideration of what the penalty

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1 should be?

2 THE PROSPECTIVE JUROR: I don't know.

3 THE COURT: Is it possible?

4 THE PROSPECTIVE JUROR: Either way maybe.

5 THE COURT: When you say either way?

6 THE PROSPECTIVE JUROR: You know, well, if -- if
7 they -- they are serving life anyway without parole or -- I'm
8 trying to explain myself. I'm sorry.

9 THE COURT: That's all right. Just whatever your
10 answer is.

11 THE PROSPECTIVE JUROR: Right.

12 When you say would sway me?

13 THE COURT: No. Would that have an effect on your
14 consideration of what the penalty should be, whether the
15 penalty should be a life sentence or a death sentence?

16 THE PROSPECTIVE JUROR: I don't think so.

17 THE COURT: Apart from a mass murder, is there any
18 other type of murder situation where you would be more likely
19 to impose the death penalty?

20 THE PROSPECTIVE JUROR: I've never really been in
21 that situation. So I don't know.

22 THE COURT: Fortunately.

23 THE PROSPECTIVE JUROR: Yes.

24 THE COURT: What is the definition of a mass murder
25 to you?

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1 THE PROSPECTIVE JUROR: Doesn't have to be all at
2 once. You know, a lot of --

3 THE COURT: A lot?

4 THE PROSPECTIVE JUROR: Multiple.

5 THE COURT: Multiple murders?

6 THE PROSPECTIVE JUROR: Yes, or how horrific, you
7 know.

8 THE COURT: Do you have a number in mind?

9 THE PROSPECTIVE JUROR: Not really.

10 THE COURT: Okay. Now, you answered the following
11 question in the following way:

12 Do you believe that life imprisonment without the
13 possibility of release is a sufficiently harsh sentence for a
14 person who has been found guilty of the crime of murder?

15 You answered yes.

16 Then you said, sometimes that can be more punishment
17 than death.

18 What did you mean by that?

19 THE PROSPECTIVE JUROR: If you had to stay alive and
20 be in prison, maybe you just want to get over with. Again, I
21 don't know.

22 THE COURT: You mean, that the defendant might
23 prefer --

24 THE PROSPECTIVE JUROR: To die, yes.

25 THE COURT: To die?

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1 Well, under the law, I will instruct you, that the
2 lesser penalty is life imprisonment without the possibility of
3 release.

4 THE PROSPECTIVE JUROR: I know.

5 THE COURT: The greater, more severe penalty is the
6 death penalty.

7 In considering which penalty to impose, the greater
8 penalty or the lesser penalty, will you accept that rule of
9 the relative nature of the two penalties, one is the lesser,
10 meaning life, and the death penalty is the greater?

11 THE PROSPECTIVE JUROR: Yes, yes.

12 THE COURT: Okay. You put down DK for some of these
13 answers.

14 THE PROSPECTIVE JUROR: Don't know.

15 THE COURT: Don't know.

16 THE PROSPECTIVE JUROR: Yes.

17 THE COURT: Let me ask you again and maybe you know.

18 THE PROSPECTIVE JUROR: Okay.

19 THE COURT: But just tell me what you sincerely
20 think.

21 THE PROSPECTIVE JUROR: Okay.

22 THE COURT: All right. Are your views on the death
23 penalty such that you would be unable to consider a sentence
24 of life without the possibility of release if the evidence at
25 trial showed a defendant presented a future danger to others?

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1 THE PROSPECTIVE JUROR: Repeat the question. I'm
2 sorry.

3 THE COURT: Are your views of the death penalty such
4 that you would be unable to consider a sentence of life
5 without the possibility of release if the evidence at trial
6 showed a defendant presented a future danger to others?

7 THE PROSPECTIVE JUROR: No.

8 THE COURT: Are your views on the death penalty such
9 that you would be unable to consider a sentence of life
10 without the possibility of release if the evidence at trial
11 showed a defendant sought the murder of a cooperating witness?

12 THE PROSPECTIVE JUROR: Repeat the first part.

13 THE COURT: That's fine. I am happy to repeat it as
14 often as you like.

15 THE PROSPECTIVE JUROR: Okay.

16 THE COURT: We are in no hurry. This is very
17 important.

18 THE PROSPECTIVE JUROR: Okay.

19 THE COURT: Are your views on the death penalty such
20 that you would be unable to consider a sentence of life
21 without the possibility of release if the evidence at trial
22 showed a defendant sought the murder of a cooperating witness?

23 THE PROSPECTIVE JUROR: No.

24 THE COURT: Are your views on the death penalty such
25 that you would be unable to consider a sentence of life

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1 without the possibility of release if the evidence at trial
2 showed a defendant is already serving a sentence of life
3 imprisonment?

4 You already answered that question.

5 THE PROSPECTIVE JUROR: Okay.

6 THE COURT: What is your answer?

7 THE PROSPECTIVE JUROR: No.

8 THE COURT: Are your views on the death penalty such
9 that you would be unable to consider a sentence of life
10 without the possibility of release if the evidence at trial
11 showed a defendant was previously convicted of intentional
12 murder?

13 THE PROSPECTIVE JUROR: No.

14 THE COURT: Any other questions?

15 MR. JASPER: No, Your Honor.

16 THE COURT: Okay. We want to thank you for coming
17 in. Mr. Reccoppa will tell you what to do next.

18 Have a good afternoon.

19 THE PROSPECTIVE JUROR: Okay. You too.

20 (Juror leaves courtroom.)

21 THE COURT: Do I hear any motion?

22 I hear no motion.

23 Juror number 107 is approved.

24 We are up to 110.

25

Juror # 110

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1 (Juror number one ten is present.)

2 THE COURT: Please be seated.

3 Good afternoon.

4 THE PROSPECTIVE JUROR: Good afternoon.

5 THE COURT: You are juror number 110?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: All right. I remind you you are still
8 under oath.

9 THE PROSPECTIVE JUROR: Okay.

10 THE COURT: Let me ask you, since you filled out the
11 questionnaire until today, have you learned or heard or read
12 or been advised of anything concerning this case?

13 THE PROSPECTIVE JUROR: No.

14 THE COURT: Okay. I am just going to follow up on a
15 few questions.

16 I note that your job is as a legal secretary. Is
17 that right?

18 THE PROSPECTIVE JUROR: Right.

19 THE COURT: And that you have been in your current
20 position for seven years, is that right?

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: Without telling me who you work for,
23 please, THU firm, firm or some other
24 of legal business?

25 THE PROSPECTIVE JUROR: It's a corporation.

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Juror # 110

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1 THE COURT: You work for a corporation?

2 THE PROSPECTIVE JUROR: Yes.

3 THE COURT: You have been doing this with this
4 corporation for seven years?

5 THE PROSPECTIVE JUROR: Seven years.

6 THE COURT: Before that?

7 THE PROSPECTIVE JUROR: Various -- I was just in --
8 in Staten Island, small job in Staten Island. For a period of
9 time I wasn't -- I was home.

10 THE COURT: I see. Okay.

11 Your husband is a clerk in Supreme Court?

12 THE PROSPECTIVE JUROR: Right.

13 THE COURT: Okay. I would like to ask you a few
14 follow-up questions about your views of the death penalty.

15 THE PROSPECTIVE JUROR: A hum.

16 THE COURT: You stated that, just sentence if proven
17 by beyond a reasonable doubt. No one has a right to take a
18 life.

19 THE PROSPECTIVE JUROR: Right.

20 THE COURT: Let me just go over the way this case
21 will be tried.

22 This case has potentially two phases. The trial
23 will begin with what is called the guilt phase. The defendant
24 has been accused of three crimes; intentional and deliberate
25 murder of another individual; conspiracy to commit the murder;

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1 and a weapons charge associated with the first two charges.

2 The government has the obligation at a trial of
3 proving that the defendant is guilty beyond a reasonable
4 doubt. The defendant has no burden at all. The defendant
5 doesn't have to present any evidence. The defendant does not
6 have to testify in the case. In fact, I will instruct the
7 jury that if the defendant does not testify, that they can't
8 hold that against the defendant in any way. No adverse
9 inference against the defendant for not testifying.

10 The burden is always on the government to prove the
11 defendant guilty of the charges beyond a reasonable doubt.

12 If the defendant is found guilty of the charge of
13 intentionally and deliberately murdering another person, then
14 there will be a second phase of the trial, where the two
15 different options for the penalty will be on the table for the
16 jury to consider.

17 The presumptive penalty is life without the
18 possibility of release. That is generally the penalty for
19 this crime. But in this case there is also the possibility
20 that a more severe penalty may be imposed by the jury, and
21 that is death.

22 The jury would have to decide the penalty of death
23 unanimously. Every single juror would have to agree. If even
24 one juror decided that a penalty of death was not appropriate
25 and the penalty of life was the appropriate penalty, then the

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1 penalty would be life in prison without the possibility of
2 release.

3 Every juror has the right to decide for him or
4 herself what the penalty should be. No juror ever has to
5 impose a death penalty.

6 Do you understand all of those principles?

7 THE PROSPECTIVE JUROR: Right.

8 THE COURT: Okay. Let me ask you this. If the jury
9 should return a verdict of guilty for intentional and
10 deliberate murder against the defendant and there is a penalty
11 phase -- let me just say this, the government will provide to
12 the jury at the penalty phase information on some aggravating
13 factors that it believes drives this case out of the life
14 sentence area and makes it beyond a reasonable doubt
15 appropriate to impose the death penalty. Once again, the
16 government has that burden.

17 The defense could provide the jury with certain
18 mitigating factors, which would augur in favor of a life
19 sentence offsetting the aggravating factors that the
20 government provides to the jury. The defense is under no
21 obligation to provide any evidence but it may, if it wishes
22 to, provide those mitigating factors.

23 Once you have heard the aggravating factors -- you
24 don't know what they are yet -- and the mitigating factors and
25 you've already reached a verdict of guilty of intentional and

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1 deliberate murder, do you believe that you could impose the
2 penalty of death on a defendant?

3 THE PROSPECTIVE JUROR: Yes. If I am comfortable at
4 that point, yes.

5 THE COURT: And conversely, after hearing the
6 aggravating and mitigating factors, could you impose a penalty
7 of life in prison without the possibility of release?

8 THE PROSPECTIVE JUROR: Yes.

9 THE COURT: We are talking about in a case where
10 someone is convicted of an intentionally and deliberate murder
11 of another person.

12 You understand that?

13 THE PROSPECTIVE JUROR: Yes.

14 THE COURT: Okay. Now, let me ask you, is there any
15 kind of murder or circumstance of murder that would cause you
16 to be more willing to impose the death penalty on a defendant?

17 THE PROSPECTIVE JUROR: I don't see why. As long as
18 it -- it was with intent, I don't see -- what would matter.

19 THE COURT: We are only talking about intentional
20 murder here. We are not talk about accidents. We are not
21 talking about negligence. We are talking about intentional
22 murder.

23 THE PROSPECTIVE JUROR: Right.

24 THE COURT: So you could impose the death penalty in
25 any situation of intentional murder potentially?

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: Would you accept the Court's instruction
3 that the penalty of life in prison without the possibility of
4 release is the presumptive appropriate penalty for this crime?

5 THE PROSPECTIVE JUROR: Yes, sure.

6 THE COURT: Let me ask you, if at the penalty phase
7 you received evidence that a defendant had committed another
8 murder and was serving life sentence for that murder, would
9 you always impose the death penalty for that, in that
10 situation?

11 THE PROSPECTIVE JUROR: Well, I thought it was only
12 for this particular charge. I don't think you could consider
13 anything else.

14 THE COURT: For the purpose of the first phase, the
15 guilt phase, you can only consider the charge and the evidence
16 on the charge.

17 THE PROSPECTIVE JUROR: Right.

18 THE COURT: But once the defendant is found guilty,
19 if he is, of that charge of murder, intentional murder, then
20 there is the second phase, where you will be asked to consider
21 other information about the defendant. Some of it is
22 aggravating, presented by the government; and then the defense
23 may present other information that is mitigating. In other
24 words, that would counterbalance, if you will, whatever the
25 aggravating information is. This is information about the

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1 background, the history, the circumstances of the defendant
2 and his activities and other information.

3 It is hard to say exactly what it will be but I am
4 just giving you a for instance. If for instance one of the
5 aggravating factors that is brought to light by the government
6 is that the defendant is serving a life sentence without
7 possibility of release for another murder, would you always
8 impose the death penalty, possibly impose the death penalty,
9 or not impose the death penalty?

10 THE PROSPECTIVE JUROR: Possibly.

11 THE COURT: Possibly.

12 THE PROSPECTIVE JUROR: Possibly.

13 THE COURT: What else would you want to know about
14 the defendant's background before making a decision as to what
15 the proper penalty is?

16 THE PROSPECTIVE JUROR: Well, convictions.

17 THE COURT: You mean, other convictions?

18 THE PROSPECTIVE JUROR: Other convictions.

19 THE COURT: Anything else?

20 THE PROSPECTIVE JUROR: That's it.

21 THE COURT: Are there any factors or is there any
22 information that you think might act as a mitigation that
23 would overcome some of these aggravating factors?

24 Is there something that you would want to know about
25 the person's background that might help you in balancing out

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1 the aggravators as against the mitigators?

2 I know it is --

3 THE PROSPECTIVE JUROR: It is pretty broad. Not
4 that I can --

5 THE COURT: It is a very hard question.

6 THE PROSPECTIVE JUROR: -- think of.

7 THE COURT: Let me see what else I can ask you.

8 Do you understand that this case has no relationship
9 to an accidental or an unintentional act of murder?

10 Do you understand?

11 This is strictly about intentional murder.

12 THE PROSPECTIVE JUROR: Okay.

13 (Continued on next page.)

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1 THE COURT: And the death penalty would not apply.
2 First of all, the defendant can't be convicted of an
3 intentional murder if it's accidental. If you find the murder
4 is accidental, then the person can't be convicted of an
5 intentional murder.

6 Do you understand that?

7 THE PROSPECTIVE JUROR: Yes.

8 THE COURT: Let me ask the parties: Any questions?

9 MR. GOLTZER: Yes, your Honor.

10 THE COURT: Okay.

11 (Sidebar.)

12 THE COURT: Mr. Jasper.

13 MR. JASPER: Judge, could you follow up on Question
14 107? That's the cost-to-taxpayer question. She indicated
15 society shouldn't have to pay for the worst murderers.

16 THE COURT: Okay. What else?

17 MR. JASPER: Also, there seems to be a disconnect in
18 the role of intentional murder with this particular juror.
19 105 is: "Do you believe that everyone who commits murder
20 should receive the death penalty?"

21 She says "No, and it should be unintentional."

22 You covered that. If we can just get at "You're
23 sitting on a jury and the jury returns a verdict for a
24 deliberate, planned murder. At that point before you hear
25 anything, what is your view towards the death penalty with

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1 respect to a convicted murderer?."

2 The other question that I would like you to follow
3 up on is, she said that convictions would be something she
4 would be interested in knowing about, and I know we kind of
5 touched on it. If she finds out that the defendant, at the
6 time the penalty phase begins, has been previously convicted
7 of deliberating planning an intentional murder, would that be
8 a situation where she could consider a life sentence, in that
9 situation?

10 If you could also ask her -- it's similar to that
11 question -- when would life without the possibility of release
12 be appropriate, or would she ever be able to consider it, what
13 examples she might give for that?

14 Judge, if you'd give me one second.

15 Judge, could you ask her what the impact of learning
16 that a defendant sought to kill a law enforcement official
17 might be?

18 MS. MERKL: Your Honor, the juror already answered
19 that question in the questionnaire. The juror also answered
20 your Honor's question about whether she would always impose a
21 sentence of death in the event that somebody was serving a
22 sentence of life for another murder conviction. Your Honor
23 was very clear in explaining that issue, and she answered that
24 she would possibly impose the death penalty. She certainly
25 didn't indicate she would always impose the death penalty. I

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1 don't think any follow-up is necessary as to that question.

2 In regards to cost, your Honor, the juror indicated
3 in the questionnaire that it would not compel her to vote.
4 Your Honor asked the question in a similar manner to the way
5 the parties formulated it in the questionnaire, would that tip
6 the scales in such a way that she would always vote for death
7 because of her concerns about the costs?

8 MR. JASPER: What she said, society shouldn't have
9 to pay for the worst murderers, who have no regard for human
10 life.

11 THE COURT: I'll discuss it with her.

12 MS. MERKL: Then she stated that would not compel
13 her to vote for the death penalty.

14 THE COURT: I'll ask her. Thank you.

15 (In open court.)

16 THE COURT: I just have a couple of more questions.

17 Let me ask you: You answered the following question
18 in the following way: "Is the cost to taxpayers for housing an
19 inmate for a life sentence a concern to you?"

20 You said "Yes. Society shouldn't have to pay for
21 the worst murderers, who have no regard for human life."

22 Would the -- in your view, is the cost of
23 incarceration a consideration in whether to impose a penalty
24 of death as opposed to a life sentence?

25 THE PROSPECTIVE JUROR: No.

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1 THE COURT: And do you accept the principle, legal
2 principle, that a death sentence is a more severe penalty than
3 a life sentence?

4 THE PROSPECTIVE JUROR: Yes. It should be. I
5 believe so. But maybe some people, not everybody, might see
6 it that way.

7 THE COURT: But I'll instruct you that for your
8 consideration at a penalty phase, that's the law.

9 THE PROSPECTIVE JUROR: Right.

10 THE COURT: And that's the law that you must apply.

11 THE PROSPECTIVE JUROR: Hmm.

12 THE COURT: So, if you find, if the jury finds, that
13 the lesser penalty is the appropriate penalty, that's a life
14 sentence.

15 THE PROSPECTIVE JUROR: Yes.

16 THE COURT: You understand that?

17 THE PROSPECTIVE JUROR: Yes.

18 THE COURT: Can you follow that rule?

19 THE PROSPECTIVE JUROR: Absolutely.

20 THE COURT: Let me go back to one of the potential
21 aggravators in the case. I think you may have covered this.
22 Let me just ask you again.

23 If the government presents evidence in the penalty
24 phase that the defendant is currently serving a life sentence
25 for committing another murder, would you -- is it more likely

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1 that you will impose the death penalty, taking all the other
2 factors into consideration?

3 THE PROSPECTIVE JUROR: Yes.

4 THE COURT: Would you always impose the death
5 penalty in that situation?

6 THE PROSPECTIVE JUROR: Always? That's hard to
7 say "always."

8 THE COURT: That's why I asked you the question.

9 THE PROSPECTIVE JUROR: Yes.

10 THE COURT: Is it likely that you would impose the
11 death penalty?

12 THE PROSPECTIVE JUROR: Yes, very likely.

13 THE COURT: Very likely?

14 THE PROSPECTIVE JUROR: Very likely.

15 THE COURT: But would you always impose it?

16 THE PROSPECTIVE JUROR: Without hearing everything?

17 THE COURT: Let me follow up on that.

18 Do you believe it's possible that you would learn
19 about -- let me put it this way: If you learned about certain
20 mitigating factors, is it possible that those mitigating
21 factors would counterbalance and overcome the likelihood that
22 you would impose the death penalty for that aggravating factor
23 that I just described?

24 THE PROSPECTIVE JUROR: It's a possibility. It's a
25 possibility.

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1 THE COURT: But it's not likely?

2 THE PROSPECTIVE JUROR: Probably not likely, but
3 possible.

4 THE COURT: Is there anything else that you would
5 like to know about the defendant's background at the penalty
6 phase before making a decision as to what the appropriate
7 penalty should be?

8 THE PROSPECTIVE JUROR: No.

9 THE COURT: And if you were the last person on the
10 jury, and everyone else voted for the death penalty but you
11 weren't so sure, and you indicated that you're going to vote
12 for life without the possibility of release, what would you do
13 in that case?

14 THE PROSPECTIVE JUROR: First, the only one not
15 sure?

16 THE COURT: Well, let me put it more specifically.
17 If you had reservations and believed that the
18 government had not proven beyond a reasonable doubt that the
19 defendant deserved the death penalty, what would you do?

20 THE PROSPECTIVE JUROR: Follow the charge, probably
21 not give the death penalty, if that's -- you know, I have to
22 follow the charge.

23 THE COURT: Anything else?

24 MR. JASPER: No, your Honor.

25 MS. MERKL: No, your Honor.

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1 THE COURT: We want to thank you for coming in.
2 Have a good afternoon. Mr. Recoppa will tell you what to do
3 next.

4 THE PROSPECTIVE JUROR: Okay.

5 (Prospective Juror No. 110 leaves the courtroom.)

6 MR. JASPER: Judge, the defendant moves to strike
7 this juror in line with the observation by the Supreme Court
8 in Uttecht vs. Brown. Looking at her demeanor, her demeanor,
9 she said "very likely" to impose the death penalty where
10 convicted of another murder. That was what we asked your
11 Honor to specifically focus on. You did. She said "very
12 likely." Would it be possible? And she said it would be
13 possible for life. She was kind of like shaking her head back
14 and forth. She seemed pretty clear that she very likely would
15 be for the death penalty if the second conviction came out.
16 That's what I base this on, your Honor.

17 MS. MERKL: Your Honor, the government disagrees.
18 The juror stated she could possibly vote for life imprisonment
19 under those circumstances, and she said she would consider
20 mitigators and aggravators consistent with her questionnaire
21 and what she indicated that she would consider aggravating and
22 mitigating factors. And we would note that the preference for
23 a life -- the preference for a death sentence does not
24 disqualify a juror. If they would fairly and impartially
25 consider the mitigating factors, as well. She indicated she

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1 would. She indicated more than one time in her questionnaire
2 that all of the facts need to be considered, and that she had
3 evaluate both mitigators and aggravators.

4 In light of the totality of the record as to this
5 juror, including her answers under the Court's questioning,
6 the government believes that she is both life-qualified and
7 death-qualified.

8 THE COURT: All right.

9 I'll reserve. We're up to 111.

10 MS. MERKL: Your Honor, as I intended to state,
11 perhaps I did or did not, under United States vs. Fulks, a
12 juror's preference for voting for the death penalty does not
13 automatically disqualify them if they are willing to consider
14 mitigating circumstances.

15 THE COURT: Thank you.

16 (Prospective Juror No. 111 enters the courtroom.)

17 THE COURT: Good afternoon. You are Juror No. 111?

18 THE PROSPECTIVE JUROR: Yes.

19 THE COURT: I remind you you are still under oath.
20 And let me ask: Since you filled out the questionnaire, have
21 you read, learned, observed or been advised of anything about
22 this case?

23 THE PROSPECTIVE JUROR: No.

24 THE COURT: You indicated that you are a letter
25 carrier; is that right?

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1 THE PROSPECTIVE JUROR: Yes.

2 THE COURT: And you have been doing that for eight
3 years?

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: Before that, were you employed?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: What kind of work did you do?

8 THE PROSPECTIVE JUROR: Operate -- telephone
9 operator.

10 THE COURT: How long did you do that?

11 THE PROSPECTIVE JUROR: About three years.

12 THE COURT: Was that for a private company or a
13 public organization of some type?

14 THE PROSPECTIVE JUROR: It was for a major telephone
15 company, yes.

16 THE COURT: You indicated that your father was a
17 New York City Policeman and your uncle was a detective?

18 THE PROSPECTIVE JUROR: Yes.

19 THE COURT: Did you ever discuss their work with
20 them.

21 THE PROSPECTIVE JUROR: No.

22 THE COURT: Do you know what kind of detective work
23 your uncle did.

24 THE PROSPECTIVE JUROR: No.

25 THE COURT: Let me ask you: You indicated that last

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1 September, you sat on a state grand jury; is that right?

2 THE PROSPECTIVE JUROR: Yes.

3 THE COURT: And how long did you sit on a grand
4 jury?

5 THE PROSPECTIVE JUROR: It was for four weeks,
6 Monday through Friday.

7 THE COURT: It was a four-week period?

8

9 THE PROSPECTIVE JUROR: Hmm.

10 THE COURT: What kinds of cases did you consider?

11 THE PROSPECTIVE JUROR: They were mostly DWI,
12 larceny, burglary.

13 THE COURT: Any homicides?

14 THE PROSPECTIVE JUROR: No.

15 THE COURT: Now, you left this out, so I'm going to
16 ask you this question, and I'm going to ask you to respond. I
17 think you must missed the page.

18 The question is: Please describe your views on the
19 death penalty.

20 THE PROSPECTIVE JUROR: Actually, I didn't answer
21 it, because I really never thought about it.

22 THE COURT: You said that on the next page.

23 THE PROSPECTIVE JUROR: Yes. I really, before this
24 situation, I never really thought about it. I mean, I guess
25 I'm not against the death penalty.

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1 THE COURT: Okay.

2 THE PROSPECTIVE JUROR: But as I also said, I'm not
3 really sure if I would be able to make that kind of a decision
4 in regards to somebody else's life.

5 THE COURT: Let me just describe what the process is
6 in this case. The case is divided into two parts. In the
7 first part of the case, which is called the guilt phase, once
8 the jury is impaneled, the jury will hear evidence from the
9 government which the government believes will prove beyond a
10 reasonable doubt that the defendant committed the crimes
11 charged. The three crimes charged are intentional and
12 deliberate murder of another person; conspiracy to commit
13 murder; and a weapons charge in association with the other two
14 crimes.

15 The burden of proof is always on the government.
16 The defendant never has to prove anything. The defendant
17 never has to testify. You can't hold it against the defendant
18 that he didn't testify. The government has the sole
19 obligation to prove its case beyond a reasonable doubt.

20 Do you understand that?

21 THE PROSPECTIVE JUROR: Yes.

22 THE COURT: If the government, in the view of the
23 jury, has met its burden and the jury finds the defendant
24 guilty beyond a reasonable doubt, then there will be a second
25 phase of the trial. It's called the penalty phase, and in

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1 this case, there are only two penalties that are available to
2 the jury. The first penalty, which is the presumptive penalty
3 that is normally imposed, is life without the possibility of
4 release.

5 In this case, there's also a second penalty, a more
6 serious penalty than life in prison, and that is the death
7 penalty.

8 So, the jury needs to decide whether to impose the
9 life sentence or whether the death sentence is more
10 appropriate.

11 Now, the way the jury goes about doing this is that
12 the government is required to provide what are called
13 aggravating factors to the jury, evidence of circumstances,
14 the background of the defendant, certain other -- his
15 activities and so forth that the government believes would
16 require beyond a reasonable doubt or show beyond a reasonable
17 doubt that the more severe penalty, the death penalty, should
18 be imposed.

19 The defense may offer mitigating factors --
20 information about the defendant's background, circumstances,
21 record and so on -- that it believes would demonstrate that
22 the appropriate penalty is life in prison without the
23 possibility of release and that the more severe penalty is not
24 appropriate.

25 So, after hearing all of that, the jury will return

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1 to the jury room and consider a verdict. All twelve jurors
2 will have to vote in favor of the death penalty in order to
3 impose the death penalty. If even one juror decides that life
4 in prison is the appropriate sentence, and not the more severe
5 sentence of death, then the defendant will get life in prison.
6 Each individual juror has the right to decide for him or
7 herself. But I will instruct the jury that you should hear
8 each other out before you make your decision, and consider the
9 views of the other jurors.

10 In the end, if you personally believe that the death
11 penalty -- it has not been demonstrated beyond a reasonable
12 doubt by the government that the death penalty is the only
13 appropriate sentence and you vote for life, then the defendant
14 will get life even if the other eleven jurors vote for death,
15 and that's the way it works.

16 Now, I know it's difficult for you, not knowing what
17 these factors are. If the jury returns a verdict of guilty
18 for the intentional and deliberate murder of an individual and
19 we go into a penalty phase and you see the evidence of
20 aggravators and mitigators, do you believe that in any
21 circumstance, you could impose the penalty of death?

22 THE PROSPECTIVE JUROR: I would have to listen to
23 the aggravating or -- I would have to hear what the
24 circumstances are.

25 THE COURT: Okay. Are there any circumstances --

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1 let me withdraw that.

2 Is there any type of intentional murder that would
3 cause you to be more likely to impose a death sentence?

4 THE PROSPECTIVE JUROR: No. Again, I would have to
5 know exactly what the circumstances behind it were. I
6 wouldn't just, you know, blanket say, yes, for this type of
7 murder.

8 THE COURT: Now, you answered this question: "The
9 question of whether a defendant should live or die is a moral
10 decision each juror must make for himself or herself. Do you
11 feel you can make such a decision?" And you said "No. I
12 really don't know if I can make a decision that would end
13 another life."

14 Is that your position?

15 THE PROSPECTIVE JUROR: That is my decision. I
16 really don't know if I could, you know. I just really don't
17 know.

18 THE COURT: And then you said, when asked: "Which of
19 the following best describes your view of the death penalty,
20 check one: Support in some cases, inappropriate in most
21 cases?," and you explained your answer, "When someone
22 intentionally murders someone else, they show disregard for
23 that person's life, family, etcetera. They put no value on
24 life. Should their life have value?" That's a question, not
25 an answer. You put a question mark after that.

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1 So, your answer was that you supported the death
2 penalty in some cases. And my question is: In what cases can
3 you imagine imposing the death penalty?

4 THE PROSPECTIVE JUROR: The thing is, like I said,
5 I'm not opposed to the death penalty. I do believe that it is
6 appropriate. I just don't know if I could be the one to make
7 the decision to put somebody to death.

8 MR. GOLTZER: Your Honor, can we have a sidebar, or
9 is it too early?

10 THE COURT: No. That's fine. Whenever you are
11 ready.

12 (Sidebar.)

13 THE COURT: Okay.

14 MR. JASPER: Judge, my thinking is this: I don't
15 know what the government's view of this is, but the point is.
16 She seems really not to be able to make an individual choice.
17 I don't think it helps either side to have a juror in there
18 who is just subject to the vicissitudes of the jury.

19 THE COURT: I agree with you. I don't want to
20 presume that's your view. That's why I kept trying to pin her
21 down to get some sort of valuable response.

22 MR. JASPER: I appreciate it, Judge, because
23 although she seems kind of, you know, in the abstract or a
24 general principle supports it, the issue is, can she
25 personally deliver a personal moral decision with any way or

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1 the other? If she's sitting there, it doesn't help either one
2 of us, because there's no strong --

3 THE COURT: I hear you.

4 Do you agree?

5 MS. MERKL: Is he on the prosecution team all of a
6 sudden?

7 THE COURT: No. He has right reason.

8 MR. GOLTZER: He's righteous.

9 THE COURT: Do you have anything to add to that?

10 MS. MERKL: A follow-up question along the lines
11 Mr. Jasper suggests.

12 THE COURT: You have a question?

13 MR. JASPER: No, I don't.

14 THE COURT: I don't have a question, either.

15 (In open court.)

16 THE COURT: I know how difficult it is to deal with
17 these kinds of questions. It's not what you do every day in
18 your life. We all appreciate your efforts to provide answers
19 to us. We thank you for coming in.

20 Mr. Recoppa will tell you what to do next.

21 THE PROSPECTIVE JUROR: Okay.

22 THE COURT: Have a nice day.

23 THE PROSPECTIVE JUROR: Thank you.

24 (Prospective Juror No. 111 leaves the courtroom.)

25 THE COURT: Is there a consent to strike the juror?

The Prospective Juror # 112

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1 MR. JASPER: Yes, your Honor.

2 MS. MERKL: Yes, your Honor.

3 THE COURT: All right.

4 Number 111 is struck for cause on consent.

5 We're up to 112.

6 (Prospective Juror No. 112 enters the courtroom.)

7 THE COURT: Please be seated, sir. Good afternoon.

8 THE PROSPECTIVE JUROR: Good afternoon.

9 THE COURT: You are Juror No. 112?

10 THE PROSPECTIVE JUROR: Yes.

11 THE COURT: You're still under oath.

12 Have you read, heard or learned anything about this
13 case since you filled out the questionnaire?

14 THE PROSPECTIVE JUROR: No.

15 THE COURT: All right. Thank you.

16 I'm just going to ask you a few follow-up questions
17 based on your questionnaire.

18 You indicated that you worked for the last year and
19 three-quarters in the heating business; is that right?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: Without telling me who you work for,
22 what kind of work do you do?

23 THE PROSPECTIVE JUROR: Basically, I'm a helper. I
24 do treating.

25 THE COURT: What does it mean to do heat treating?

The Prospective Juror # 112

764

1 What do you do?

2 THE PROSPECTIVE JUROR: They get -- the company that
3 I work, they get the pieces from another company.

4 THE COURT: A manufacturer?

5 THE PROSPECTIVE JUROR: I guess.

6 THE COURT: And then what do they do?

7 THE PROSPECTIVE JUROR: And the treating is by heat.

8 THE COURT: Is that in order to strengthen the part?

9 THE PROSPECTIVE JUROR: No exactly. Making it
10 harder.

11 THE COURT: Then when you finish treating it, it
12 goes back to the manufacturer, who uses it in some sort of
13 machine?

14 THE PROSPECTIVE JUROR: Yes.

15 THE COURT: And before you did this job, what did
16 you do for a living?

17 THE PROSPECTIVE JUROR: Parking.

18 THE COURT: What?

19 THE PROSPECTIVE JUROR: Parking. Parking attendant.

20 THE COURT: How long did you do that?

21 THE PROSPECTIVE JUROR: Ten years.

22 THE COURT: You like this job better?

23 THE PROSPECTIVE JUROR: This one?

24 THE COURT: Yes.

25 THE PROSPECTIVE JUROR: The benefits.

The Prospective Juror # 112

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1 THE COURT: The benefits.

2 THE PROSPECTIVE JUROR: The other was, I loved it.

3 THE COURT: You like the other one?

4 THE PROSPECTIVE JUROR: Yes.

5 THE COURT: In the other job, did you work for one
6 company for the whole time?

7 THE PROSPECTIVE JUROR: No.

8 THE COURT: How many different companies did you
9 work for?

10 THE PROSPECTIVE JUROR: Around four. But mostly in
11 two. The other one was for just one month.

12 THE COURT: You were asked for your views on the
13 death penalty, and you said "As a Christian, I think that God
14 is Who gives and can take away lives, but as men law, it is
15 acceptable. Give God what is belong to him, and to Caesar
16 what is belong to Caesar."

17 What did you mean by that?

18 THE PROSPECTIVE JUROR: Well, the means is right
19 there. I don't know if you read in the Bible when the people
20 was attending Jesus Christ, the emperors charging too much
21 taxes, and then God said -- I mean, Jesus said to them like
22 the taxes are for the emperor, and give God what is God's.
23 That means the mans do some rule. That's okay. So, if you
24 believe in God, you believe in God first, and then if in your
25 society, you follow what the rules are.

The Prospective Juror # 112

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1 THE COURT: So, if in a case where someone has been
2 convicted of killing another person intentionally, do you
3 think that the death penalty is an appropriate penalty?

4 THE PROSPECTIVE JUROR: Like I write on the paper,
5 as the men rule or men law, if what takes to those events men
6 law to any determine, like the man law say.

7 THE COURT: Anything else?

8 MR. JASPER: Nothing, your Honor.

9 MS. MERKL: No, your Honor.

10 THE COURT: I want to thank you for coming in, sir.
11 Recoppa will tell you what to do next. Have a nice day.

12 THE PROSPECTIVE JUROR: Thank you.

13 (Juror No. 112 leaves the courtroom.)

14 THE COURT: All right.

15 Is there any objection to striking this individual?

16 MR. JASPER: No, your Honor.

17 THE COURT: I think based on --

18 MS. MERKL: Language, your Honor. He indicated in
19 Question Number Two that his reading is not perfect, and his
20 answers in the box suggest he has a little bit of a language
21 issue.

22 THE COURT: All right. 112 is struck.

23 Let's take a five-minute break.

24 (Recess taken.)

25 (Continued on next page.)

1 (Open court.)

2 (The defendant is present.)

3 THE COURT: This is 114.

4 (Prospective juror present.)

5 THE COURT: You are Juror No. 114?

6 THE PROSPECTIVE JUROR: Yes.

7 THE COURT: I remind you that you are still under
8 oath. Let me ask you, since you filled out the questionnaire,
9 have you heard, listened to, observed any information about
10 this case?

11 THE PROSPECTIVE JUROR: Yes, I have.

12 THE COURT: What information is that?

13 THE PROSPECTIVE JUROR: Basically from by chance
14 going through Google it came up and it was in the news. I
15 read a little bit about it.

16 THE COURT: What did you Google?

17 THE PROSPECTIVE JUROR: I Googled his name,
18 basically. It just sounded so familiar to me.

19 THE COURT: Sidebar.

20 (Sidebar.)

21 THE COURT: Mr. Goltzer.

22 MR. GOLTZER: I too have Googled Mr. Basciano just
23 to see what is going on out there. One of the first thing
24 that comes up is a Wikipedia article on Mr. Basciano which was
25 amended by whom we do not know on February 5, 2011 to reflect

1 the theory that Mr. Basciano was the boss of the Bonanno
2 family while he was incarcerated.

3 I don't know where that came from, I can't imagine,
4 but if that's what he's been doing, I don't think he can sit.
5 I don't know what he read. If he went out of his way to
6 Google Basciano, he shouldn't be a juror.

7 THE COURT: In the first place, he completely
8 ignored my instructions. So this is not a good start. I
9 would dismiss him out of hand.

10 MR. GOLTZER: Right.

11 MS. MERKL: The government would note that Mr.
12 Goltzer's suggestion that in some way the government was
13 responsible for the Wikipedia entry is ludicrous.

14 MR. GOLTZER: I'm not suggesting anybody in this
15 room. It happened. The judge didn't do it.

16 MS. MERKL: Neither did the government.

17 THE COURT: Thank you.

18 MR. GOLTZER: I'm noting for the record that I too
19 Googled it. The reason I noted it now is if this guy Googled
20 Basciano the second thing he would see is a Wikipedia article
21 that claims that Basciano was the actual boss of the family
22 after he was arrested after Massino flipped.

23 I don't know where that came from on February 5,
24 2011. I'm making everybody aware of it.

25 THE COURT: The Internet is a whole new element in

1 that we have to deal with in the criminal justice system and
2 it's very, very difficult. If people are going to have to
3 completely ignore my instructions -- he's the first one.

4 MR. GOLTZER: That we know of.

5 THE COURT: I think generally from demeanor of the
6 other people who I've asked, it wouldn't appear that they were
7 hiding anything.

8 MR. GOLTZER: We have no reason to believe they were
9 lying.

10 THE COURT: Thank you.

11 (Open court.)

12 THE COURT: What did you learn about Mr. Basciano
13 when you Googled him?

14 THE PROSPECTIVE JUROR: Basically that, you know, he
15 is serving a life sentence currently. But it talked more
16 about your opinion on the case.

17 THE COURT: My opinion?

18 THE PROSPECTIVE JUROR: Yeah, I believe that's what
19 the news said, that you were against the case, that you were
20 against it going forward.

21 THE COURT: Against the case going forward?

22 THE PROSPECTIVE JUROR: Yeah, because you thought it
23 was a waste of time. I'm just being honest.

24 THE COURT: That's why I asked you the question.
25 What else did you learn? I'm interested because it will be

1 useful to know how it appeared to you.

2 THE PROSPECTIVE JUROR: I really didn't take
3 anything to heart or to really -- I didn't delve into it that
4 much. I just read a few paragraphs.

5 THE COURT: You will recall that I asked you not to
6 do any research on the case. Why did you decide to do this,
7 why did you decide to Google it, which is very easy to do?

8 THE PROSPECTIVE JUROR: That's really what it was.
9 It was so easy. It really didn't have anything to do against
10 what you said.

11 It wasn't that I went home and did that. I waited a
12 few days. It was sitting there, I saw his name there and I
13 said, let me Google his name.

14 THE COURT: You saw his name where, in the paper?

15 THE PROSPECTIVE JUROR: The Internet is the paper
16 nowadays.

17 THE COURT: You said you saw his name there?

18 THE PROSPECTIVE JUROR: On the paper that we have.

19 THE COURT: The paper from the court?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: Thanks for coming in.

22 Mr. Reccoppa will tell you what to do next. Have a
23 good day.

24 THE PROSPECTIVE JUROR: You too.

25 (Prospective juror leaves.)

Prospective Juror 117

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1 THE COURT: Consent to strike the juror for failing
2 to follow the instructions of the court?

3 MS. MERKL: Yes, your Honor.

4 MR. JASPER: Yes, Judge.

5 THE COURT: Number 114 is struck on consent.

6 (Pause.)

7 THE COURT: We're up to 117.

8 (Prospective juror present.)

9 THE COURT: Please be seated, sir.

10 THE PROSPECTIVE JUROR: Hello, Judge, your Honor.

11 THE COURT: Good afternoon.

12 You're Juror No. 117.

13 THE PROSPECTIVE JUROR: Yes, sir.

14 THE COURT: Let me ask you, since you filled out the
15 questionnaire have you read, learned of, observed, been
16 advised of anything regarding this case?

17 THE PROSPECTIVE JUROR: I know about as much of this
18 today as I know when I left here about a month ago. When I
19 came in I never heard of it. This is not stuff I really
20 follow.

21 THE COURT: So you didn't learn anything more than
22 you already knew?

23 THE PROSPECTIVE JUROR: No.

24 THE COURT: What did you already know about the case
25 before you came to court to fill out the questionnaire?

Prospective Juror 117

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1 THE PROSPECTIVE JUROR: About this case? I remember
2 seeing the headline about a very big arrest, I think it was
3 127 people, but this case I've never heard of before.

4 THE COURT: Thank you.

5 Now, you have been doing your current job for the
6 last ten years; is that right?

7 THE PROSPECTIVE JUROR: Almost 11.

8 THE COURT: Okay. And it involves something having
9 to do with payroll?

10 THE PROSPECTIVE JUROR: I do --

11 THE COURT: What is the general type of work that
12 you do?

13 THE PROSPECTIVE JUROR: I do database, spreadsheets,
14 I do reports for clients, call-in files. I work with the
15 bookkeeper on the payroll.

16 THE COURT: Are you self-employed or do you work --

17 THE PROSPECTIVE JUROR: No.

18 THE COURT: You work for a company?

19 THE PROSPECTIVE JUROR: Yes.

20 THE COURT: You've worked for the same company for
21 ten years?

22 THE PROSPECTIVE JUROR: It was kind of part-time for
23 awhile but it's just about 11 years now.

24 THE COURT: Your father was with the Nassau County
25 Police --

Prospective Juror 117

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1 THE PROSPECTIVE JUROR: He was Nassau County police.

2 THE COURT: Did he also work for the Treasury?

3 THE PROSPECTIVE JUROR: He was a U.S. Customs
4 officer. He worked as a Nassau County policeman. His
5 academic background was engineering so he left the police
6 force, he worked as an engineer for maybe 20 years, he
7 retired, he went into security work and he eventually ended up
8 working, I'd say, for 8 or 10 years as Customs at Kennedy
9 Airport.

10 THE COURT: You indicated in answer to questions
11 about your medical condition, that you have a short attention
12 span and that if you were going to school today you might be
13 diagnosed with ADHD or ADD?

14 THE PROSPECTIVE JUROR: Yes. Anyone who works with
15 me can tell you, they'll say, Can you do this for me? I need
16 to know the answer in five minutes. They come back five
17 minutes later, What happened? I'll do it right now.

18 I have on my iPods a series of lectures for a
19 certification exam that I'll be taking later on. I think I
20 listened to the lectures three times and I don't remember half
21 of them. I start day dreaming.

22 Teachers all the way through elementary school, they
23 tried putting me up front and center just to get me to pay
24 attention. I've got a wandering, day dreaming mind.

25 THE COURT: Have you ever served on a jury?

Prospective Juror 117

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1 THE PROSPECTIVE JUROR: I was called for jury duty a
2 couple of times in Nassau, never served on a regular jury. In
3 '93 I did a month as a Nassau County grand juror.

4 THE COURT: You put a question mark next to the yes
5 to this answer: Do you have any opinions about lawyers that
6 would make it difficult for you to render a fair and impartial
7 verdict? You put a question mark and said well, some lawyers
8 do --

9 THE PROSPECTIVE JUROR: Some lawyers, they do what
10 they're paid to do.

11 THE COURT: I'm sorry. What does that mean?

12 THE PROSPECTIVE JUROR: In other words, I remember
13 on TV years ago one lawyer who said that for a \$25,000 fee he
14 could get almost anyone off even a third drunk driving --
15 what's the word I want? -- arrest.

16 THE COURT: This is a while ago?

17 THE PROSPECTIVE JUROR: That was a wile ago. But,
18 you know --

19 THE COURT: All right. You also answered yes to
20 this question: Have you or has a family member or close
21 friend ever been a witness to or victim of a crime?

22 THE PROSPECTIVE JUROR: Yes. I had an aunt who came
23 home one day and was held up at gunpoint.

24 THE COURT: Who?

25 THE PROSPECTIVE JUROR: An aunt. I had a somewhat

Prospective Juror 117

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1 more distant relative. One day her house was broken into and
2 she was, as I recall correctly, kind of badly beaten up.

3 I have had a few bicycles stolen. I've never really
4 been a victim of a serious crime. My father when he was a cop
5 had his elbow broken when he caught a guy trying to hot wire a
6 car under the dashboard.

7 THE COURT: Who got caught, the person --

8 THE PROSPECTIVE JUROR: My father saw feet sticking
9 out a car door and went to see what was going on. The guy was
10 trying to hot wire the car -- this was years ago -- and the
11 guy kicked him in the elbow so hard he broke his elbow. I
12 remember he had a very long scar on his elbow.

13 THE COURT: Sidebar.

14 (Sidebar.)

15 MR. GOLTZER: I think he would find it difficult to
16 concentrate on a case of this magnitude.

17 MS. MERKL: Your Honor, the government agrees. His
18 questionnaire indicated at a couple of points that he'd have
19 difficulty sitting still and being able to pay attention, and
20 given his overall demeanor, we think that --

21 THE COURT: He's hyper. His demeanor appears to be
22 a hyperactive demeanor and I think it would be very difficult
23 for him to sit for long periods of time listening to evidence
24 in a case of this complexity and this duration.

25 MR. GOLTZER: We certainly agree. We think it would

Prospective Juror 117

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1 be difficult for jurors to sit with him.

2 THE COURT: I think you're right about that, too.

3 MR. GOLTZER: I mean it. It wasn't a quip.

4 THE COURT: It would be difficult in the juryroom as
5 well. Thank you everyone.

6 (Open court.)

7 THE COURT: Okay. I think that does it. We thank
8 you for coming in. Mr. Reccoppa will tell you what to do
9 next.

10 THE PROSPECTIVE JUROR: Thank you very much.

11 THE COURT: Have a good day, sir.

12 (Prospective juror leaves.)

13 THE COURT: Let's have a formal motion, please.

14 MS. MERKL: Your Honor, the government has no
15 objection to dismissing this juror for cause. I think it's a
16 joint application.

17 The juror indicated in his questionnaire that he
18 that has difficulty sitting still. That was in question 123.
19 He also indicated in question four that he has ADD and
20 difficulty concentrating, lapses in attention, things of that
21 nature.

22 His demeanor in the box suggested that he may have
23 some sort of issue along those lines and the government's
24 concerned that he will not be able to sit on a trial for
25 several weeks for hours at a time closely following the

Prospective Juror 118

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1 evidence.

2 MR. JASPER: We agree.

3 THE COURT: You agree?

4 MR. GOLTZER: Yes.

5 THE COURT: The juror is struck on those grounds by
6 consent.

7 Next juror is 118.

8 (Prospective juror present.)

9 THE COURT: Please be seated, sir.

10 Good afternoon.

11 THE PROSPECTIVE JUROR: Good afternoon.

12 THE COURT: You are juror 118?

13 THE PROSPECTIVE JUROR: Yes, I am.

14 THE COURT: Very well. Let me ask you
15 preliminarily. Since you filled out the questionnaire have
16 you read or learned or been advised of anything about this
17 case?

18 THE PROSPECTIVE JUROR: Here and there, just hearsay.

19 THE COURT: Well, here or there hearsay, what kind
20 of here or there hearsay?

21 THE PROSPECTIVE JUROR: Basically, I would say not
22 more than what you told us the day we were here to fill out
23 the questionnaire, as far as the charges and the fact that
24 he's serving time now and stuff like that.

25 THE COURT: Where did you learn that he was serving

Prospective Juror 118

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1 time now?

2 THE PROSPECTIVE JUROR: In discussions with other
3 people.

4 THE COURT: What people are you talking about?

5 THE PROSPECTIVE JUROR: Just other jurors and stuff
6 like that that we have been discussing.

7 THE COURT: You've been talking to other jurors
8 about it?

9 THE PROSPECTIVE JUROR: Just in topics, you know,
10 about the case and stuff. What they know, what they've heard.

11 THE COURT: You mean other jurors in this case?

12 THE PROSPECTIVE JUROR: Yeah.

13 THE COURT: Where have you had those conversations?

14 THE PROSPECTIVE JUROR: Just sitting around, just
15 shooting the breeze.

16 THE COURT: Back there?

17 THE PROSPECTIVE JUROR: Back there, in the other room
18 and stuff.

19 THE COURT: Do you remember who told you that the
20 defendant was serving time?

21 THE PROSPECTIVE JUROR: No, just -- we just all were
22 talking and stuff like that. It just came up.

23 THE COURT: What else did you learn?

24 THE PROSPECTIVE JUROR: Not much else.

25 MR. GOLTZER: May we have a sidebar?

Prospective Juror 118

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1 THE COURT: When you say not much else, obviously
2 that means there is something else?

3 THE PROSPECTIVE JUROR: No, there was nothing else
4 really to discuss, nothing else besides what you initial read
5 the day we did the questionnaire.

6 THE COURT: Did you read anything in the papers
7 about it?

8 THE PROSPECTIVE JUROR: No.

9 THE COURT: Did you Google it on the Internet?

10 THE PROSPECTIVE JUROR: Nope.

11 THE COURT: Would you like a sidebar?

12 MR. GOLTZER: Please.

13 (Sidebar.)

14 MR. GOLTZER: The juror, the prospective juror has
15 obviously brought up a potential issue that is of concern. We
16 are not sure -- not only the defense but everybody in the
17 courtroom -- as to whether there have been numerous
18 conversations among perhaps qualified jurors or prospective
19 jurors to come about Mr. Basciano and facts that are not
20 within the evidence yet in this case.

21 We would ask that the court conduct further inquiry
22 of this particular juror with respect to which days he had
23 those conversations, how many people took part in the
24 conversations, whether they were today with the folks who were
25 here. We just would like to see this developed.

Prospective Juror 118

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1 MR. JASPER: I think we certainly need to find out a
2 little bit more about what happened, who told who what, how
3 many people.

4 It is a bit disturbing if it happened today and this
5 is the first time we're hearing about it. I'm not sure how we
6 want to proceed beyond pursuing it now.

7 These are people we think are good jurors and it's
8 not something that we're jumping for joy about, but it's a
9 question in my mind.

10 MR. GOLTZER: Certainly I think it would call for,
11 at the least, to have a few more questions of him and then ask
12 prospective jurors who come in over the next couple of days
13 whether they have had such conversations.

14 MS. MERKL: I think it would help to draw down when
15 he heard about the fact of the defendant serving time and
16 whether or not he learned it from Googling friends who
17 potentially came to this afternoon's panel. Perhaps the taint
18 is in that fashion, perhaps it isn't, but it would help to
19 draw down on that point.

20 MR. GOLTZER: We're not taking a position or making
21 a motion, we're asking to develop it.

22 THE COURT: For information. Thank you.

23 (Open court.)

24 THE COURT: Let me just follow up on what you
25 mentioned earlier. With respect to having learned that the

Prospective Juror 118

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1 defendant was already serving time, did you learn that today
2 back in the jury deliberation room?

3 THE PROSPECTIVE JUROR: Not necessarily. I was --

4 THE COURT: No, no. Please. I asked you a specific
5 question. I expect an answer to the question.

6 THE PROSPECTIVE JUROR: No.

7 THE COURT: Not necessarily is not the answer?

8 THE PROSPECTIVE JUROR: No.

9 THE COURT: When did you learn it?

10 THE PROSPECTIVE JUROR: When I did the questionnaire,
11 I was pretty much ascertaining from the way the questions were
12 asked about somebody serving, already serving, how would you
13 feel about the penalty and stuff like that, and I kind of
14 ascertained from that that it was related.

15 THE COURT: Did you discuss it with anybody?

16 THE PROSPECTIVE JUROR: No.

17 THE COURT: Well, were there any discussion back in
18 the jury deliberation room while you were waiting today about
19 any of the facts of the case?

20 THE PROSPECTIVE JUROR: Yes.

21 THE COURT: Tell me what was said.

22 THE PROSPECTIVE JUROR: Just the fact that he's
23 presently serving time.

24 THE COURT: Who --

25 THE PROSPECTIVE JUROR: That was it.

Prospective Juror 118

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1 THE COURT: Who said that he was serving time?

2 THE PROSPECTIVE JUROR: One of the other jurors. I
3 don't know his name. One of the other jurors that we were
4 talking to.

5 THE COURT: So you surmised it from the
6 questionnaire --

7 THE PROSPECTIVE JUROR: Yeah.

8 THE COURT: But it was confirmed by this other
9 person's statement?

10 THE PROSPECTIVE JUROR: Correct.

11 THE COURT: And did this person indicate the source
12 of his or her information?

13 THE PROSPECTIVE JUROR: No.

14 THE COURT: And did this person have any other
15 information -- it's important that you try to recall this
16 because it's very important to us that we know the type of
17 information that may be out and about some of which may be
18 accurate, some of which may be erroneous, and it's important
19 for the integrity of the process.

20 Let me just explain why we're concerned about it;
21 for the integrity of the process, and in fairness to someone
22 accused of a very serious crime, it is important that everyone
23 follow the rules that we establish so as to protect the
24 defendant's rights and he get a fair trial.

25 That's our objective here, to provide the defendant,

Prospective Juror 118

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1 who is accused of a serious, very serious crime, to provide
2 him with a fair trial. So that's why I'm asking you this and
3 that's why it's of such concern to us. It's not about you,
4 it's about the process.

5 So when I ask you the question, it's not an
6 accusation, it's just that I need to know. This person who
7 made that statement, did he know or she -- was it a he?

8 THE PROSPECTIVE JUROR: Yes.

9 THE COURT: All right. And just describe him.

10 THE PROSPECTIVE JUROR: He was the youngest, I
11 guess, appeared to be the youngest of the bunch.

12 THE COURT: Was he short, tall.

13 THE PROSPECTIVE JUROR: Average height, six-foot.

14 THE COURT: Stocky or thin?

15 THE PROSPECTIVE JUROR: Medium build, I guess. He
16 had the short hair.

17 THE COURT: And did he have any other intelligence
18 to report?

19 THE PROSPECTIVE JUROR: No.

20 THE COURT: So other than this one item, have you
21 learned anything about this case?

22 THE PROSPECTIVE JUROR: No, nothing -- no.

23 THE COURT: When you were down in the jury assembly
24 area, did you also have an opportunity to talk to these other
25 folks about the case?

Prospective Juror 118

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1 THE PROSPECTIVE JUROR: Well, talk about the case?
2 We discussed it as far as what we knew from the questionnaire.
3 We were more talking about the questionnaire, what went on the
4 day we had to fill out the questionnaire and stuff.

5 THE COURT: And so specifically what about the
6 questionnaire did you --

7 THE PROSPECTIVE JUROR: Just the questions, the
8 variety of questions that they asked, the endless, you know,
9 questions about certain points and multiple questions and so
10 on and so forth.

11 THE COURT: And in terms of topics, what topics were
12 mentioned by someone or another down there, any particular --
13 there are lots of different topics in the questionnaire.

14 THE PROSPECTIVE JUROR: Right.

15 THE COURT: What topics were of interest to some of
16 the jurors?

17 THE PROSPECTIVE JUROR: We discussed the repeated
18 questioning about the penalties, the death penalty, the life
19 without parole and -- what else was there? -- if you knew
20 anybody who was a police officer. Some of the guys -- some of
21 people have police officers in the family and stuff, so on and
22 so forth.

23 THE COURT: This afternoon's group was only seven
24 people?

25 THE PROSPECTIVE JUROR: Right.

Prospective Juror 118

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1 THE COURT: There were seven people down there
2 chatting?

3 THE PROSPECTIVE JUROR: Six of us were talking.
4 There was one gentleman who didn't really have much to say.

5 THE COURT: Do you have any other questions for the
6 juror?

7 MR. JASPER: No, your Honor.

8 THE COURT: Do you have any questions for the juror?

9 MS. MERKL: No, your Honor.

10 THE COURT: I thank you for coming in. You have a
11 nice day. Mr. Reccoppa will tell you what to do next.

12 THE PROSPECTIVE JUROR: Thank you.

13 THE COURT: Take care now.

14 (Jury leaves.)

15 (Continued next page)

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1 THE COURT: All right. Is there a motion on 118?

2 MR. GOLTZER: We obviously move to strike him for
3 violating the Court's instructions and the like.

4 MS. MERKL: Your Honor, the government does not
5 object.

6 THE COURT: All right. Number 118 is struck.

7 MR. GOLTZER: We have a further suggestion.

8 THE COURT: All right.

9 That's on consent.

10 That completes the interviews for today. Do you
11 have something further?

12 MR. GOLTZER: We are kind of curious as to what the
13 Court suggests. Our view, if you would like to hear it?

14 THE COURT: Of course.

15 MR. GOLTZER: As I understand it, there were
16 only -- with respect to this afternoon's group of seven
17 people, only number 107 was actually qualified. There was one
18 other juror upon which the Court reserved.

19 THE COURT: Right.

20 MR. GOLTZER: It might be prudent to strike those
21 two for being tainted by whatever did happen in the back this
22 afternoon.

23 It is also our view with respect to those jurors who
24 have already been qualified, we are unaware of any basis upon
25 which to move to disqualify them.

1 If the Court in its discretion when they are brought
2 back wants to make a neutral inquiry as to whether they heard
3 anything, we would have no objection to that.

4 In the future, with respect to jurors who come in,
5 I'm sure the Court can fashion a direction or instruction or
6 an inquiry to make sure that nothing like this happens again.

7 We are not specifically moving for a mistrial or
8 anything like that.

9 MR. JASPER: That's correct, Your Honor.

10 MR. GOLTZER: We --

11 THE COURT: The only thing that I would do, even if
12 you did, is I'd call in more jurors.

13 MR. GOLTZER: I understand that.

14 THE COURT: And just add to the 650 people that you
15 have already reviewed. I could call in 50, 100, 500.

16 MR. GOLTZER: I know.

17 THE COURT: We will just keep going. I haven't made
18 any plans until Christmas.

19 MR. GOLTZER: We are not suggesting anything to the
20 contrary. We wanted to make our position clear so the
21 record --

22 THE COURT: I appreciate that.

23 Here is the thing.

24 Let me hear from -- is that it from your side?

25 MR. JASPER: Yes.

1 MR. GOLTZER: It is.

2 THE COURT: Let me hear from the government. Then I
3 will tell you what my preliminary view is on it.

4 Go ahead.

5 MS. MERKL: Your Honor, both of the jurors as to who
6 may or may not have been exposed to this information in the
7 jury room are jurors 107 and 110 to be clear for the record.
8 107 was qualified; 110 defense moved to strike for cause and
9 Your Honor reserved.

10 Both of these jurors, if memory serves correctly,
11 were asked if they'd heard anything about the case. They said
12 no. We have no reason to believe that they were lying about
13 that fact.

14 In addition, in the Court's colloquy with those two
15 jurors they were asked in various permutations whether or not
16 they would be able to consider the evidence in this case
17 knowing that the defendant was previously serving a term of
18 life for a deliberate additional murder.

19 These jurors are getting this information through
20 the Court process. I think what these two jurors, rather than
21 just striking them on the assumption that they may have been
22 tainted, we should inquire of them before we do that.

23 THE COURT: I am willing to bring them back and ask
24 them.

25 MR. GOLTZER: We have no problem with that,

1 certainly. But I should simply note that we seem to
2 have -- either they didn't understand the full import of the
3 inquiry but there seems to be a contradiction between the
4 responses that they gave and the responses of the last
5 gentleman.

6 THE COURT: I think --

7 MR. GOLTZER: Except for one juror. I don't know
8 who that was who didn't take part. Whether they heard or not
9 I don't know.

10 THE COURT: One of the potential jurors was
11 extremely loquacious and another one completely defied the
12 Court's instruction and did Internet research.

13 MR. GOLTZER: Right.

14 THE COURT: So we have two people who were in the
15 room back there who might have a lot to say or might have
16 information to impart.

17 MR. GOLTZER: Yes.

18 THE COURT: All right. I've never had this problem
19 with people sitting back there in the last ten years, but --

20 MR. GOLTZER: I have seen it once before.

21 THE COURT: I think the question is, how do we
22 preempt it for the rest of the venire. That is really the
23 question.

24 It is possible that when they arrive the jury clerk
25 can instruct them that they are not to -- we can agree on some

1 language to be read to them, they are not to discuss anything
2 about the case with each other.

3 MR. GOLTZER: It is my sense that such an
4 instruction needs to come from the Court. So it might be
5 prudent to bring them in.

6 THE COURT: I am listening.

7 MR. GOLTZER: As I understand the process,
8 Mr. Reccoppa literally walks the whole group by the door. I
9 have seen it. I happen to see them walk by the door.

10 So if he simply brings them into court and the Court
11 puts them in the jury box and tells them, you are going to be
12 interviewed one at a time. It's very important that while you
13 are waiting back there, you can discuss the weather, the
14 basketball games but not this case, not anything you may have
15 read in the newspapers.

16 THE COURT: I can do it up here. It is better up
17 here.

18 MR. GOLTZER: That's it.

19 THE COURT: What we will try to do is as soon as all
20 of them have arrived, I will have them brought up and put in
21 the jury box and I will instruct them.

22 MR. GOLTZER: Mr. Jasper also suggests that there
23 might be a sign, a written sign, wherever they wait in the
24 jury room, not to discuss the case, as a reminder.

25 MR. JASPER: Judge, it might be helpful but I

1 certainly believe that if they are all up here and see the
2 Court and are in this venue and this forum and you just
3 explain to them, this is important, just don't talk about the
4 case. Coming from you, Judge, I think that that --

5 THE COURT: I will remind them. On Thursday
6 morning, as soon as they all here, I will have them brought
7 up. The defendant will be brought in before they arrive.
8 They will come in and I will instruct them and then they will
9 retire to the jury room.

10 Let see how that works.

11 MR. GOLTZER: Fine.

12 THE COURT: I will still ask my question at the
13 beginning of each interview to find out whether they've done
14 any research on the case since the questionnaires were prepare
15 prepared.

16 All right?

17 MR. GOLTZER: Yes.

18 That still leaves with us the question of the two
19 people from this afternoon, I guess.

20 THE COURT: I haven't ruled on one of them.

21 MR. GOLTZER: Right.

22 THE COURT: I could bring the other one back in the
23 next few days, just to ask the question.

24 MR. GOLTZER: Perfect.

25 THE COURT: The one that I haven't ruled on, I can

1 bring that one back too before I rule.

2 MR. GOLTZER: True.

3 THE COURT: We will work it out.

4 MR. GOLTZER: Sure.

5 THE COURT: All right. Is that agreeable to the
6 government?

7 MS. MERKL: It is, Your Honor.

8 THE COURT: Okay. We are not convening tomorrow but
9 we will be back Thursday at 9:30 --

10 MR. GOLTZER: Yes.

11 THE COURT: -- for the next session.

12 Do we have the list?

13 MR. GOLTZER: We have the list.

14 Do I assume you have stricken the last juror on the
15 record? I didn't --

16 THE COURT: Yes. I believe I did strike the last
17 juror and both sides gave their reasons and I agreed and the
18 juror, that's 119? 118.

19 MR. GOLTZER: 118.

20 THE COURT: 118 was stricken by consent.

21 All right. Is there anything else for this
22 afternoon? From the government?

23 MS. MERKL: Just as a housekeeping matter, juror 102
24 who did not show up, is that person scheduled for Thursday?

25 THE CLERK: We will try for Thursday.

1 THE COURT: Thursday is the day for 102.

2 MR. GOLTZER: As a housekeeping matter, there had
3 been an inquiry made of the government about a visiting issue.

4 THE COURT: Yes?

5 MR. GOLTZER: Mr. Basciano at the MDC had been able
6 to have two people visit him at once from his family. He has
7 been notified by the MCC, they refuse to do it. We asked the
8 government if it would require a modification of the SAM's.
9 The government was kind enough to say they would look into it.

10 Presumably, Mr. Basciano has been advised by the MCC
11 that even if the government modifies the SAM's, they won't
12 hear of it, which I find rather presumptuous on their part.
13 We will ask the Court to make inquiry of the government if
14 they will make an effort to modify the SAM's. I'm sure if the
15 SAM's are modified, the MCC won't go along with it, we'll have
16 a further application.

17 MS. MERKL: Your Honor, the SAM's process, perhaps
18 contrary to Mr. Goltzer's belief, is not a unilateral decision
19 that the government makes. The government, meaning the
20 Department of Justice in Washington, DC, makes determinations
21 about SAM's provisions in consultation with the BOP and in
22 this instance the BOP is of the view that having more than one
23 adult visitor is inappropriate under the SAM's.

24 At this juncture I have discussed it with the MCC
25 and have not had very much time, of course, during the work

1 day to discuss it with Main Justice because I have been in
2 court.

3 But at this point it is a correct summary that the
4 BOP is not amenable to visits with more than one adult.
5 Whether or not Washington and the BOP would modify the SAM's
6 is unknown to the representatives of the government who are
7 presently in court.

8 MR. GOLTZER: I guess that will cause us to write a
9 letter to the Court.

10 THE COURT: Yes, why don't you do that? I will take
11 it under consideration.

12 MR. GOLTZER: Thank you.

13 THE COURT: All right. Anything else?

14 MR. JASPER: No, Judge.

15 THE COURT: All right. Thank you very much,
16 everyone. Have a good night.

17 (Recess taken until March 10, 2011, at 9:30 am.)
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